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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on the New International
Economic Order
Eleventh session
New York, 5-16 February 1990

PROVISIONAL AGENDA

1. Election of officers
2. Adoption of the agenda
3. Procurement
4. Other business
5. Adoption of the report

Notes on the provisional agenda

At its nineteenth session in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 1/ The Working Group commenced its work on this topic at its tenth session, held at Vienna from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

The Commission, at its twenty-second session in 1989, expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously (A/44/17, paras. 232 and 235).

1/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

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The Working Group is composed of all States members of the Commission. These are:

Argentina, Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, Hungary, India, Iran, Iraq, Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Togo, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

Item 1. Election of officers

The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Procurement

The tenth session will have before it reports of the Secretary-General containing the text of a draft model law on procurement (A/CN.9/WG.V/WP.24) and a commentary on the draft model law (A/CN.9/WG.V/WP.25).

Adoption of the report

The Working Group may wish to adopt, at the close of its session, a report for submission to the twenty-third session of the Commission.

Meetings

The session of the Working Group will take place at United Nations Headquarters, New York. Meetings are scheduled from 5 February to 9 February, and on 12, 13, 14 and 16 February. No meeting will be scheduled for Thursday, 15 February, in order to allow for the preparation of the draft report of the session. Meeting hours will be from 10.00 to 1.00 and from 3.00 to 6.00, except on Monday, 5 February, when the session will commence at 10.30.

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Working Group on the New International
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Eleventh session
New York, 5-16 February 1990

PROCUREMENT

Draft model law on procurement

Report of the Secretary-General

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted this work to its Working Group on the New International Economic Order.[1/] The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study of procurement prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125). It agreed that, while the model law should not be confined to international procurement, it should take into account the particular needs and interests of foreign participants in procurement proceedings (ibid., para. 122). The Commission at its twenty-second session in 1989 expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously (A/44/17, paras. 232 and 235).

2. The present report contains the first draft of a model law on procurement as requested by the Working Group. The commentary is contained in a separate document (A/CN.9/WG.V/WP.25). Provisions concerning the right of aggrieved contractors and suppliers to claim redress for violations of the model law are not contained in the present draft text; that subject will be dealt with in a separate document.

3. The Working Group may wish to discuss the policy issues raised by the draft articles and the commentary and to instruct the Secretariat to redraft the draft articles and commentary on the basis of the discussion.

DRAFT MODEL PROCUREMENT LAW

CHAPTER I. GENERAL PROVISIONS

Article 1. Application of Law *

This Law applies to procurement by procuring entities of goods, through such means as purchase, rental or otherwise, or of construction. The procurement shall be considered to be a procurement of goods or of construction where the goods or construction constitute a substantial part of the procurement.

1/ Report of the United Nations Commission on International Trade Law on the Work of its nineteenth session (Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)), para. 243.

*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

Article 2. Definitions

For the purposes of this Law:

(a) "procuring entity" means:

(i) any department, agency, organ or other unit, or any subdivision thereof, of the Government or the administration;

(ii) [each State enacting this model law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity"].

(b) "goods" includes raw materials, products, equipment and other tangible objects of every kind and description;

(c) "construction" means such physical work as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, in respect of a new structure or of an existing structure;

(d) "procurement proceedings" means proceedings engaged in or measures taken by a procuring entity with a view towards entering into a procurement contract, including tendering proceedings, competitive negotiation proceedings and single source procurement;

(e) "International tendering proceedings" means the proceedings referred to in article 11, for which chapter II of this Law requires the application of particular procedures with a view towards promoting international participation in the tendering proceedings;

(f) "Tender security" includes such arrangements as bank guarantees, letters of credit, cheques on which a bank is primarily liable and cash deposits, provided by a contractor or supplier to secure obligations in respect of its tender;

(g) "Currency" includes unit of account;

(h) "Competitive negotiation proceedings" means negotiations by the procuring entity with contractors and suppliers with a view towards procurement, such negotiations being subject to rules set forth in article 34 designed to incorporate a competitive element;

(i) "Single source procurement" means procurement from a particular contractor or supplier without engaging in tendering proceedings or competitive negotiation proceedings.

Article 3. Underlying policies

(1) The underlying policies of this Law are:

(a) to maximize economy and efficiency in procurement;

(b) to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, international participation;

(c) to promote competition among contractors and suppliers for the supply of the goods or construction to be procured;

(d) to provide for the fair and equitable treatment of all contractors and suppliers in connection with procurement covered by this Law;

(e) to promote the integrity of, and fairness and public confidence, in the procurement process; and

(f) to achieve transparency in the procedures relating to procurement.

(2) This Law is subject to any international agreement, or any agreement with or other obligation towards an international institution or a governmental institution of another State, which has already been or may be entered into by [this State] and which contains provisions concerning the matters governed by this Law.

Article 4. Procurement regulations

The . . . [each State enacting this model law specifies the organ or authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to elaborate upon or supplement this Law.

Article 5. Public accessibility of Procurement Law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

Article 6. Control and supervision of procurement

(1) The approval function referred to in articles 7(2), 7(3), 11(2), 12(2), 28(3), 28(10), 29(1), 31(1), [32(1),and] [32(4)] shall be performed by ... [each State enacting this model law specifies the organ or authority authorized to perform the approval function.]

(2) [Each State enacting this model law specifies in this paragraph and, if necessary, in subsequent paragraphs, any additional functions in connection with the control and supervision of procurement and the organ[s] or authority[ies] to perform those functions.]

Article 7. Methods of procurement and conditions for their use

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) Subject to approval, the procuring entity may engage in procurement by means of competitive negotiation proceedings when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations; or

(b) tendering proceedings have been engaged in but:

(i) all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29; or

(ii) the contractor or supplier whose tender has been accepted fails to sign a procurement contract with the procuring entity when required to do so or fails to supply a required security for the performance of the contract, and no other responsive tender from an eligible and qualified contractor or supplier is in effect.

(3) Subject to approval, the procuring entity may engage in single source procurement when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods or construction is available only from the particular contractor or supplier or no reasonable alternative or substitute exists;

(c) there is an urgent need for the goods or construction making it impossible or imprudent to use tendering proceedings or competitive negotiation proceedings, as the case may be, because of the amount of time involved in using those proceedings;

(d) for reasons of standardization, or the need for compatibility with existing equipment or technology, goods must be procured from a particular contractor or supplier;

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) for reasons of national security there is a need for secrecy in respect of the procuring entity's procurement needs.

(4) The procuring entity shall not divide its procurement of the goods or construction into separate contracts for the purpose of invoking paragraph (2)(a) or (3)(a).

(5) A procuring entity that invokes the provisions of paragraph (2) or (3) shall include in the minutes required under article 34(4) or the record required under article 35 a statement of the circumstances on which it relied and, except in respect of paragraph (3)(f), shall specify the relevant facts.

Article 8. Eligibility of contractors and suppliers

(1)(a) The procuring entity may require contractors and suppliers participating in procurement proceedings to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(i) have legal capacity to enter into the procurement contract;

(ii) are not insolvent, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in [this State];

(iv) have not been convicted of any criminal offense concerning their professional conduct within a period of [5] years preceeding the commencement of the procurement proceedings;

(v) [...] [each State enacting this model law specifies any additional eligibility requirements.]

(b) The procuring entity may, in addition, investigate by any other appropriate means the eligibility of a contractor or supplier pursuant to criteria set forth in subparagraph (a).

(2) Any requirement established pursuant to paragraph (1)(a) and the eligibility criteria set forth in that paragraph shall apply equally to all contractors and suppliers. A procuring entity shall impose no eligibility criterion other than those provided for in paragraph (1)(a).

[(3) A contractor or supplier shall not be precluded from participating in procurement proceedings for the reason that it does not conform to one or more eligibility criteria set forth in paragraph (1) if the contractor or supplier undertakes to establish its conformity during the course of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so.]

Article 9. Qualifications of contractors and suppliers

The procuring entity may require contractors and suppliers participating in procurement proceeding to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers possess sufficient qualifications with respect to technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract. Any such requirement, and any criterion established with respect to those qualifications, shall apply equally to all contractors and suppliers. A procuring entity may, in addition, investigate by any other appropriate means the qualifications of a contractor or supplier.

Article 10. Rules concerning written statements and documentary evidence provided by contractors and suppliers

(1) This article applies to written statements and other documentary evidence provided by contractors and suppliers to demonstrate their eligibility and qualifications in procurement proceedings.

(2) A written statement, and documentary evidence other than that emanating from a governmental, judicial or administrative authority, shall be signed and sworn to or otherwise solemnized by the maker of the written statement or the documentary evidence before a notary or other authority competent under the law of the place where the authority serves to attest to the authenticity of

the written statement or documentary evidence and to its signature and solemnization, and the attestation of the notary or other competent authority shall be affixed or joined to the written statement or documentary evidence. The attestation by a foreign notary or other competent authority shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(3)(a) Documentary evidence emanating from a governmental, judicial or administrative authority outside [this State] shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(b) Documentary evidence emanating from a governmental, judicial or administrative authority in [this State] shall conform to the law applicable in [this State] concerning the signature, solemnization and legalization of such documents.

CHAPTER II. TENDERING PROCEEDINGS

SECTION I. INTERNATIONAL TENDERING PROCEEDINGS

Article 11. International tendering proceedings

(1) Subject to paragraph (2), a procuring entity that is required under article 7 to engage in tendering proceedings may decide to engage in international tendering proceedings, taking into account the objectives of economy and efficiency in the procurement.

(2) Where the price of the procurement contract exceeds the amount set forth in the procurement regulations, a procuring entity that is required under article 7 to engage in tendering proceedings must engage in international tendering proceedings unless it receives approval not to engage in international tendering proceedings. The procuring entity shall not divide its procurement of the goods or construction into separate contracts for the purpose of avoiding the application of this paragraph.

SECTION II. SOLICITATION OF TENDERS AND APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and applications to prequalify

(1) A procuring entity shall solicit tenders, and, where applicable, applications to prequalify, from all interested contractors and suppliers by causing a notice of proposed procurement to be published in . . .[each State enacting this model law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published]. In international tendering proceedings, the notice of proposed procurement shall also be published in a newspaper or relevant trade publication or technical journal of wide international circulation. The publication shall be in a language customarily used in international trade.

(2) Where restricted participation in the tendering proceedings is more conducive to economy and efficiency, the procuring entity may, subject to

approval, solicit tenders by sending the notice of proposed procurement only to particular contractors and suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

Article 13. Lists of approved contractors and suppliers

The procuring entity may use a list of approved contractors and suppliers as its source for the selection of contractors and suppliers from which to solicit tenders pursuant to article 12(2) only if:

(a) requests to be entered on the list are receivable at any time from any interested contractor or supplier and are acted upon within a reasonably short period of time;

(b) entry on the list is subject to no eligibility criterion more stringent than those set forth in article 8(1)(a) and is subject to no qualification criterion more stringent than those established pursuant to article 15;

(c) the existence of the list, the conditions to be satisfied by contractors and suppliers in order to be entered on the list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and for renewal of the entry have been generally publicized in a manner designed to bring them to the attention of contractors and suppliers;

(d) the conditions, methods, procedures and other matters referred to in subparagraph (c) do not discriminate against foreign contractors and suppliers with respect to entry on a list used for the solicitation of tenders in international tendering proceedings or with respect to their opportunity to participate in such proceedings; and

(e) the selection by the procuring entity from the list allows all contractors or suppliers on the list equitable opportunities to be selected.

Article 14. Contents of notice of proposed procurement

(1) The notice of proposed procurement shall contain the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the eligibility criteria set forth in article 8(1)(a);

(e) the means of obtaining the procurement documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the procurement documents and, in the case of international tendering proceedings, the currency and means of payment for those documents;

(g) in the case of international tendering proceedings, the language or languages in which the procurement documents are available;

(h) the place and deadline for the submission of tenders.

(2) If prequalification proceedings are to be engaged in, the notice of proposed procurement shall so state. In such a case, the notice of proposed procurement need not contain the information referred to in paragraph (1)(e) or (g), but shall contain the following additional information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents and, in the case of international tendering proceedings, the currency and terms of payment for those documents;

(c) in the case of international tendering proceedings, the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

SECTION III. QUALIFICATIONS OF CONTRACTORS AND SUPPLIERS

Article 15. Assessment of qualifications of contractors and suppliers

(1) The procuring entity shall assess the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents or in the procurement documents.

(2) The qualification criteria shall be objective to the extent possible and shall be limited to those which are essential to ensure that the contractors or suppliers possess sufficient technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract.

(3) In the case of international tendering proceedings, the procuring entity shall establish no criterion, requirement or procedure with respect to the demonstration or assessment of the qualifications of contractors and suppliers which unduly hinders the ability of foreign contractors and suppliers to show that they are qualified.

Article 16. Prequalification proceedings

(1) Except where participation in tendering proceedings is restricted pursuant to article 12(2), the procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, contractors and suppliers that are eligible and qualified to perform the procurement contract.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the notice of proposed procurement and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain all information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to, the information required to be included in the notice of proposed procurement pursuant to article 14(1), except subparagraph (e) thereof, plus the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) any additional information concerning the goods to be supplied or the construction to be effected that would be useful to contractors or suppliers in preparing their prequalification applications;

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the criteria and procedures to be used for assessing the qualifications of contractors and suppliers;

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers;

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the prequalification proceedings.

(4) The procuring entity shall promptly notify all contractors and suppliers submitting applications to prequalify whether or not they have been prequalified and shall make available to the general public the names of all contractors and suppliers that have been prequalified. All contractors and suppliers that have been prequalified shall be entitled to submit tenders.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefor, but the procuring entity shall not be required to give reasons to substantiate those grounds.

(6) A procuring entity that has engaged in prequalification proceedings is not precluded from re-assessing at a later stage of the tendering proceedings the eligibility and qualifications of contractors and suppliers that have been prequalified.

SECTION IV. PROCUREMENT DOCUMENTS

Article 17. Provision of procurement documents to contractors and suppliers

The procuring entity shall provide a set of the procurement documents to contractors and suppliers in accordance with the procedures and requirements specified in the notice of proposed procurement. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of the procurement documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

Article 18. Contents of procurement documents

The procurement documents shall contain all information necessary to enable contractors and suppliers to prepare and submit responsive tenders, including, but not limited to, the following information:

(a) instructions for preparing tenders;

(b) the eligibility criteria set forth in article 8(1)(a);

(c) if the qualifications of contractors and suppliers are to be assessed or re-assessed after the opening of tenders, the criteria and procedures to be used for the assessment or re-assessment;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the nature and required technical and quality characteristics of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(f) the required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(g) whether alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents are solicited;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a specification of the portion or portions for which tenders may be submitted;

(i) the manner and, in international tendering proceedings, the currency or currencies in which the tender price is to be formulated and expressed;

(j) any applicable maximum or minimum tender price, or any applicable range within which tender prices must fall or the formula to be used to establish such range;

(k) in international tendering proceedings, the language or languages in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, and with respect to the type or types of institutions or entities from which such securities will be acceptable;

(m) the manner, place and deadline for the submission of tenders;

(n) the means by which, pursuant to article 24, contractors and suppliers may seek clarifications of the procurement documents and the place and time of any meeting of contractors and suppliers convened by the procuring entity;

(o) the period of time during which tenders shall be in effect;

(p) the place, date and time for the opening of tenders, the procedures to be followed for opening, examining, evaluating and comparing tenders and for ascertaining the most advantageous tender, and the criteria to be used for evaluating and comparing tenders and for ascertaining the most advantageous tender, including, but not limited to, such factors as how the criteria will be quantified or otherwise applied, the relative weight or other indication of the degree of importance that each criterion will have, the manner in which the criteria will be combined and in which the tenders will be compared in order to ascertain the most advantageous tender, and any margin of preference that will be applied, its amount and the manner of its application;

(q) in international tendering proceedings, the currency that will be used for the purpose of evaluating and comparing tenders and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate issued by a specified financial institution prevailing on a specified date will be used;

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the tendering proceedings;

(s) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the tendering proceedings [, and references to tax, social security, safety, environmental protection, health and labour laws and regulations of [this State] pertinent to the performance of the procurement contract];

(t) the name(s) and address(es) of the person or persons authorized to communicate with contractors and suppliers in connection with the tendering proceedings and to whom communications from contractors and suppliers should be addressed.

Article 19. Charge for procurement documents

The procuring entity may charge contractors and suppliers a sum for procurement documents provided to them. The sum shall reflect only the cost of printing the procurement documents and providing them to contractors and suppliers.

Article 20. Rules concerning formulation of prequalification documents and procurement documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the procurement documents with a view to creating obstacles to participation by contractors or suppliers in tendering proceedings including, in the case of international procurement proceedings, foreign contractors and suppliers, nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used which have the effect of creating unnecessary obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the procurement documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the procurement documents.

(c) In the case of international procurement proceedings, internationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available; if they are not available, nationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available.

(4) In the case of international procurement proceedings, the prequalification documents and the procurement documents shall be formulated in . . . [each State enacting this model law specifies its official language or languages] [and in a language customarily used in international trade]. [In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail.]

[Article 21. New or amended laws or regulations relating to taxes, customs duties or similar charges, or affecting performance of procurement contract]

[The procurement contract shall provide for the procuring entity to bear any extra costs incurred by the contractor or supplier that becomes a party to the procurement contract due to new or changes in laws or regulations of [this State] relating to taxes, customs duties or similar charges, or affecting the performance by the contractor or supplier of the procurement contract, that come into force after the date [30] days prior to the deadline for submission of tenders.]

Article 22. Clarifications and modifications of procurement documents

(1) A contractor or supplier requiring a clarification of the procurement documents shall communicate a request for such clarification to the procuring entity. The procuring entity shall respond promptly to any request for clarification that is received by it prior to the deadline for submission of tenders. Copies of the response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own intiative or in response to a clarification requested by a contractor or supplier, modify the procurement documents by issuing an addendum thereto. The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the procurement documents and shall be binding on them.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the procurement documents shall be made in writing or in any other form that preserves a record of the request, response or addendum.

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the procurement documents, without identifying the sources of the requests, and its responses to those requests. The minutes shall be prepared in writing or in any other form that provides a record of the information contained therein and shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

SECTION V. TENDERS

Article 23. Language of tenders

Tenders shall be formulated and submitted in . . .[each State enacting this model law specifies its official language or languages]. In international tendering proceedings, at the option of the contractor or supplier, tenders may be formulated and submitted in any language in which the procurement documents have been issued.

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for

contractors and suppliers to prepare and submit their tenders, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers.

(2) (a) The procuring entity may, prior to the deadline for submission of tenders, extend the deadline:

(i) in order to afford contractors and suppliers reasonable time to take into account in their tenders a response by the procuring entity to a request for clarification of the procurement documents or a modification of those documents, or

(ii) if, due to unforeseen circumstances, it is not possible for contractors or suppliers to submit their tenders by the deadline.

(b) Notice of any extension of the deadline shall be given promptly in writing or in any other form that provides a record of the information contained therein to each contractor and supplier to which the procuring entity provides the procurement documents.

(3) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened or considered and shall be returned to the contractor or supplier that submitted it. [However, a tender submitted after the deadline may be considered if the contractor or supplier was not able to submit its tender by the deadline due to reasons beyond its control.]

(4) Tenders shall be submitted in writing and in sealed envelopes. [However, the procuring entity may give contractors and suppliers the option to submit tenders by any other means that provides a record of the information contained in the tender.] The procuring entity shall provide to the contractor or supplier a receipt showing the date and time when the tender was received.

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the procurement documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security. The request and the responses thereto shall be made in writing or by any other means that provides a record of the information contained therein.

(b) The procuring entity may require contractors and suppliers that agree to the extension to extend or to procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, to provide new tender securities, to cover the extended period of effectiveness of their tenders.

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders by communicating the modification or a notice of withdrawal to the procuring entity in writing or in any other form that provides a record of the information contained therein. The modification

or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.

SECTION VI. TENDER SECURITIES

Article 26. Tender securities

(1) If the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

[(b) in international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity of the type or a type, if any, specified in the procurement documents, unless the issuance of the security would otherwise be in violation of the law of [this State]].

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security to the contractor or supplier that supplied it, after the earliest to occur of:

(a) the expiry of the tender security,

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required, or

(c) The rejection by the procuring entity of all tenders pursuant to article 28(2) or (3) or article 29.

SECTION VII. OPENING, EXAMINATION, EVALUATION AND COMPARISON OF TENDERS

Article 27. Opening of tenders

(1) Tenders shall be opened at the time set forth in the procurement documents as the deadline for the submission of tenders or an extension thereof, at the place and in accordance with the procedures specified in the procurement documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders.

Article 28. Examination, evaluation and comparison of tenders

(1) (a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).

(b) The procuring entity shall correct purely arithmetical errors discovered in a tender. Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier.

(2) The procuring entity shall reject a tender:

(a) if the contractor or supplier that submitted the tender is not eligible [, subject to article 8(4),] or is not qualified to perform the procurement contract;

(b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive, except as provided in paragraph (6) of this article and in article 29(1)(a).

(3) Subject to approval, the procuring entity may reject a tender if the contractor or supplier that submitted it attempts improperly to influence the procuring entity in the process of examining, evaluating or comparing tenders or ascertaining the most advantageous tender.

(4) (a) A tender is responsive if it conforms to the required characteristics of the goods or construction to be procured, contractual terms and conditions and other requirements set forth in the procurement documents. However, the procuring entity may regard a tender as responsive if it contains only minor deviations that do not materially alter or depart from those characteristics, terms, conditions and other requirements. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders.

(b) Alterations of or departures from required characteristics, terms, conditions and other requirements of the procurement documents are material if they concern, among other things, the nature and technical and quality characteristics of the goods or construction; the quantity of the goods; the location where the construction is to be effected; the time when the construction is to be completed; the place or time when the goods are to be delivered; the terms of the procurement contract relating to the price or payment thereof; the extent of liability of one party to the other; the settlement of disputes; the tender security; the security for performance of the procurement contract; or the quality guarantee in respect of the goods or construction.

[(5) If the procurement documents solicit tenders for alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents, the procuring entity shall evaluate and compare such alternative tenders together with the tenders based on the characteristics, contractual terms and conditions and other requirements set forth in the procurement documents in order to ascertain the most advantageous tender.]

(6) [Alternative 1]

[A contractor or supplier wishing to submit an unsolicited tender for an alternative to the technical characteristics of the goods or construction set

forth in the procurement documents must also submit a tender conforming to the technical characteristics set forth in the procurement documents. An alternative tender may be considered by the procuring entity only if it was submitted by the contractor or supplier whose tender based on the technical characteristics set forth in the procurement documents has been found to be the most advantageous of such tenders.]

[Alternative 2]

[The procuring entity may consider an unsolicited tender for an alternative to the technical characteristics of the goods or construction set forth in the procurement documents if a reasonable opportunity is provided to all eligible and qualified contractors and suppliers that have submitted tenders conforming to the technical characteristics set forth in the procurement documents to alter their tenders or to submit additional tenders based on the alternative tender. The procuring entity shall evaluate and compare the alternative, altered and additional tenders together with the unaltered tenders in order to ascertain the most advantageous tender.]

(7) (a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most advantageous tender in accordance with the procedures and criteria set forth in the procurement documents.

(b) The evaluation and comparison of tenders shall be carried out in an objective manner.

(c) The most advantageous tender shall be either:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or

(ii) the most economically advantageous tender, which shall be ascertained on the basis of objective and quantifiable criteria, to the extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods or construction; the efficiency and productivity of the goods or construction; the time for delivery of the goods or completion of the construction; the terms of payment; and the terms and conditions of the quality guarantee in respect of the goods or construction; in so far as such criteria are not the subjects of required characteristics of the goods or construction or required contractual terms or conditions set forth in the procurement documents.

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria directed to ascertaining the impact of tenders in relation to specific Government programmes or policies for the promotion of national economic development, economic development of particular regions within [this State] or development of particular industries or economic sectors. To the extent possible, such criteria shall be expressed in the procurement documents in objective and quantifiable terms.]

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by adding to the tender prices of all tenders other than those that are to benefit from the margin of preference the amount provided for in the procurement regulations.

(8) When tender prices are expressed in two or more currencies, the tender prices shall be converted to a single currency for the purpose of evaluating and comparing tenders.

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 33(2).

[(10) The ascertainment by the procuring entity of the most advantageous tender is subject to approval.]

Article 29. Rejection of all tenders

(1) Subject to approval, the procuring entity may, at any time prior to the entry into force of the procurement contract, reject all tenders for any reason other than those set forth in article 28(2) or (3). However, the procuring entity may not reject all tenders for the purpose of invoking article 7(2)(b)(i) or for any fraudulent purpose.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders nor any obligation to inform them of the grounds for its action.

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders.

Article 30. Negotiations with contractors and suppliers

(1) No negotiations shall take place between the procuring entity and a contractor or suppliers with respect to a tender submitted by the contractor or supplier except that:

(a) if the procurement documents specify a maximum price for the goods or construction or a range of prices within which tender prices must fall, and all otherwise responsive tenders from eligible and qualified contractors and suppliers exceed that maximum price or range or prices, the procuring entity may negotiate with the contractor or supplier submitting the tender with the lowest price with a view towards reducing its tender price;

(b) if it appears from the evaluation and comparison of tenders that no one tender is obviously the most advantageous, the procuring entity may negotiate with contractors and suppliers whose tenders appear to be more advantageous than others with a view towards the modification of one of those tenders so that it is more advantageous than the others.

(2) No negotiations permitted by paragraph (1) shall take place concerning any required characteristics of the goods or construction, or any required contractual term or condition, set forth in the procurement documents.

SECTION VIII. SPECIAL TENDERING PROCEDURES FOR SOLICITATION OF PROPOSALS

Article 31. Special tendering procedures for solicitation of proposals

(1) Subject to approval, the procuring entity may employ the procedures provided for in this article in cases where it seeks proposals from contractors and suppliers with respect to the technical characteristics of the goods or construction to be procured because multiple alternative technical solutions might meet the needs of the procuring entity or because, due to the nature of the goods or construction, the procuring entity is unable to formulate detailed technical characteristics.

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) The procurement documents shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price.

(4) The procuring entity may engage in discussions with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or 29 concerning any aspect of its tender, other than a required characteristic of the goods or construction or a required contractual term or condition set forth in the procurement documents.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting its tender security. The final tenders shall be evaluated and compared in order to ascertain the most advantageous tender.

(6) The procuring entity shall include in the minutes required under article 33 a statement of the circumstances on which it relied in invoking the provisions of this article, specifying the relevant facts.

SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT; MINUTES OF TENDERING PROCEEDINGS

Article 32. Acceptance of tender and entry into force of procurement contract

(1) [Subject to approval,] the tender that has been ascertained to be the most advantageous shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier that submitted the tender.

(2) A procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier that submitted the tender, provided that it is [dispatched] [received] while the tender is in force and effect.

(3) (a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. The contractor or supplier shall sign the written procurement contract within a reasonable period of time after the notice is [dispatched to] [received by] it.

(b) The procurement contract enters into force when the written procurement contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier until the entry into force of the procurement contract, the contractor or supplier shall take no action which interferes with the entry into force of the procurement contract or with its performance.

(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the tender that is ascertained to be the next most advantageous tender and that is in force and effect may be accepted [,subject to approval]. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein.

(b) [Alternative 1: The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a).]

[Alternative 2: The notice referred to in paragraph (1) is "received" by the contractor or supplier when it is received by it personally or at its place of business or mailing address.]

Article 33. Minutes of tendering proceedings

(1) The procuring entity shall prepare minutes of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The minutes shall contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the eligibility and qualifications, or lack thereof, of those contractors and suppliers; the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The minutes of the tendering proceedings shall be made available for inspection by the general public after a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required, or after tendering proceedings have been terminated without resulting in a procurement contract. However, no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF TENDERING PROCEEDINGS

Article 34. Competitive negotiation proceedings

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and supplier to ensure effective competition, but in any case with at least [3] contractors and suppliers unless negotiations with [3] contractors and suppliers are not possible or are not practicable.

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement; provided, however, that the foregoing provision shall not apply to documents or other information that is particular to negotiations with an individual contractor or supplier or to documents or information the disclosure of which would be contrary to any law of [this State] relating to confidentiality.

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4) (a) The procuring entity shall prepare minutes of the competitive negotiation proceedings. The minutes shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).

(b) The minutes of the competitive negotiation proceedings shall be made available for inspection by the general public after a procurement contract has entered into force, except that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

Article 35. Record of single source procurement

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by the general public after the procurement contract has entered into force; provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

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PROCUREMENT

Commentary on draft model law on procurement

Report of the Secretary-General

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INTRODUCTION

1. The draft model law on procurement is intended to serve as a model to countries for the evaluation and improvement of their procurement laws and practices and for the establishment of procurement laws where none presently exist. Sound laws and practices for public sector procurement are necessary in all countries. The need is particularly prominent in many developing countries. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible.

2. The present document contains the commentary prepared by the Secretariat to accompany the draft model law on procurement, the text of which is contained in document A/CN.9/WG.V/WP.24. To facilitate the examination and discussion of the commentary the text of each draft article has been placed immediately preceeding the commentary that relates to it.

3. The commentary contains notes within square brackets, designated as "Working Group notes", that are intended for the information and guidance of the Working Group in considering the draft text. They would not appear in the final version of the commentary to the model law, if one were to be adopted by the Commission.

4. The following abbreviated names are used in the references contained in the "Working Group notes".

EEC Directives - Council Directive of 21 December 1976 concerning the award of public supply contracts (77/62/EEC) as amended by Council Directive of 22 July 1980 (80/767/EEC) and Council Directive of 22 March 1988 (88/295/EEC)

GATT Procurement Agreement - GATT Agreement on Government Procurement;

UNCITRAL Construction Legal Guide - UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.

United Nations Sales Convention - United Nations Convention on Contracts for the International Sale of Goods.

DRAFT MODEL LAW ON PROCUREMENT AND COMMENTARY

* * *

CHAPTER I. GENERAL PROVISIONS

Article 1. Application of Law *

This Law applies to procurement by procuring entities of goods, through such means as purchase, rental or otherwise, or of construction.

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*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

The procurement shall be considered to be a procurement of goods or of construction where the goods or construction constitute a substantial part of the procurement.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 12, 13, 42; A/CN.9/315, para. 25]

1. The model law applies regardless of the value of the procurement.

[Working Group note: rather than excluding low value contracts from the application of the model law, the approach followed in this draft is to give the procuring entity a high degree of flexibility with respect to the procedures to be followed for the formation and entry into existence of those contracts (see articles 34 and 35 and accompanying commentary), but to subject even those contracts to basic legal rules (e.g., articles 7, 8, 9, 34 and 35).]

2. The model law applies where goods or construction constitute a "substantial part" of the procurement. This includes, for example, not only procurement by means of simple sales contracts or basic construction contracts, but also by means of contracts in which the contractor or supplier undertakes obligations in addition to furnishing goods or construction, such as obligations to grant a license, to prepare a design, to perform architectural or civil engineering services, to transfer technology to the procuring entity or to train the procuring entity's personnel to operate equipment or works furnished by the contractor or supplier. Thus, the model law applies, for example to turnkey contracts for the construction of industrial works. On the other hand, the model law does not apply to the procurement of services (e.g., design, architectural or civil engineering services, insurance, financial services, advertising), of intangible rights interests (e.g., franchises, licenses, financial instruments) or of ownership or other interests in real estate, where goods or construction do not constitute a substantial part of the procurement. An implementing State may wish to provide by means of the procurement regulations detailed rules for determining when goods or construction constitute a "substantial part" of the procurement (see article 4).

[Working Group note: the Working Group has decided not to deal with the procurement of services alone at the "present stage" (A/CN.9/315, para. 25). At an appropriate time it may wish to prepare model legislation for services.]

3. The terms "procuring entity", "goods" and "construction" are defined in article 2.

* * *

Article 2. Definitions

For the purposes of this Law:

(a) "procuring entity" means:

(i) any department, agency, organ or other unit, or any subdivision thereof, of the Government or the administration;

(ii) [each State enacting this model law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity"].

(b) "goods" includes raw materials, products, equipment and other tangible objects of every kind and description;

(c) "construction" means such physical work as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, in respect of a new structure or of an existing structure;

(d) "procurement proceedings" means proceedings engaged in or measures taken by a procuring entity with a view towards entering into a procurement contract, including tendering proceedings, competitive negotiation proceedings and single source procurement;

(e) "International tendering proceedings" means the proceedings referred to in article 11, for which chapter II of this Law requires the application of particular procedures with a view towards promoting international participation in the tendering proceedings;

(f) "Tender security" includes such arrangements as bank guarantees, letters of credit, cheques on which a bank is primarily liable and cash deposits, provided by a contractor or supplier to secure obligations in respect of its tender;

(g) "Currency" includes unit of account;

(h) "Competitive negotiation proceedings" means negotiations by the procuring entity with contractors and suppliers with a view towards procurement, such negotiations being subject to rules set forth in article 34 designed to incorporate a competitive element;

(i) "Single source procurement" means procurement from a particular contractor or supplier without engaging in tendering proceedings or competitive negotiation proceedings.

* * *

Commentary

Subparagraph (a): "Procuring entity"

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 39-41; A/CN.9/315, paras. 21-24]

1. The model law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Whether the model law should also cover procurement by units of provincial, local or

other governmental subdivisions of the State depends to a certain degree on the allocation of governmental competence within the State. If an implementing State wished, the model law could also be made applicable to procurement with public funds by certain entities or enterprises outside the public sector.

2. Subparagraph (i) brings within the scope of the model law departments, agencies, organs and other units of the central Government of the State. The subparagraph refers both to the "Government" and to the "administration" of the State because, in some systems, there is a distinction between the two and because there exist in some countries agencies within the State administration that are structurally autonomous of the Government. Public sector entities and enterprises that are not considered part of the Government or the administration of the State, governmental subdivisions of the State, and any entities or enterprises outside the public sector that the implementing State wished to cover, could be brought within the coverage of the model law by specifically referring to them in subparagraph (ii) and, if necessary, in subsequent subparagraphs. An implementing State could either set forth the categories of entities and enterprises to be covered or it could specify the particular entities and enterprises to be covered. In that connection, implementing States may wish to consider one or more of the following factors as relevant to the question of which entities and enterprises or categories thereof to include:

(a) whether the Government or the administration provides public funds to the entity (e.g., ordinary appropriations of public funds to the operating or capital budgets of the entity; subsidies from public funds to cover deficits incurred by entities that are organized on a non-profit or non-self-supporting basis; extraordinary appropriations of public funds, e.g., to rescue an entity in financial difficulty; ad hoc appropriations of public funds to be used by the entity for a particular purpose, such as agricultural or industrial development grants);

(b) whether the Government or the administration provides a guarantee or other security to secure payment by the entity in connection with its procurement contract, or otherwise bears the obligations of the procuring entity under the contract;

(c) whether the entity is managed or controlled by the Government or the administration or whether the Government or the administration participates in the management or control of the entity (e.g., whether some or all of the managers or directors of the entity are civil servants or are appointed by the Government or the administration; whether the operations of the entity are in other ways subject to the control or supervision of the Government or the administration; or whether the operations of the entity are autonomous but are subject to the overall policies of the Government or the administration);

(d) whether the Government or the administration grants to the entity an exclusive licen[illegible], monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

(e) whether the Government or the administration audits the finances or operations of the entity;

(f) whether the entity is accountable to the Government or to the public treasury in respect of the profitability of the entity;

(g) whether an international agreement or other international obligation of the State applies to procurement engaged in by the entity;

(h) whether public law applies to procurement contracts entered into by the entity;

(i) whether the entity has been created by statute;

(j) whether the entity is integrated within a centralized economic plan;

(k) whether the entity performs its activities in the furtherance of a legally-mandated obligation or other public purpose.

3. The above criteria in essence present possible interests of the State in requiring certain entities or categories thereof to conduct their procurement in accordance with the procedures provided by the model law. Criterion (a) involves the interest of the State in ensuring that entities which it supports financially engage in their procurement with economy and efficiency. Under criterion (b) the State has an interest in ensuring that the purchase price, the payment of which it guarantees, is economical. The interest of the State reflected in criterion (c) is to promote public confidence in and the integrity of the public sector by ensuring that procurement engaged in by entities that are subject to State management or control is conducted fairly and properly.

4. Criterion (d) addresses the problem that, when an entity is granted an exclusive license, monopoly or quasi-monopoly, the prices of the goods that it sells or the services that it provides are subject to few competitive constraints, and therefore it may have less commercial incentive to procure economically and efficiently than does an entity that sells its goods or services in a competitive environment. Since the State has created the monopolistic situation, it might consider that it has an interest in or responsibility for seeing to it that the entity nevertheless procures with economy and efficiency. The remaining criteria involve additional indications that an entity is within the public domain and thus possibly appropriate for inclusion within the scope of application of the model law.

Subparagraph (c): "Construction"

5. "Construction" is defined in this subparagraph by means of an illustrative list of activities. The term includes the construction of such things as roads, dams, buildings, and industrial works (e.g., factories; fertilizer plants; hydroelectrical plants). The construction may be performed in respect of a new structure or in respect of an existing one (e.g., to alter, renovate or add to an existing structure). The definition includes only "physical" work; it does not include preparation of the design or supervision of construction (although, if a "substantial part" of the contract is for the acquisition of physical work of the nature indicated in the definition, it will be a "construction contract" even if those non-physical services are included; see paragraph 2 of commentary to article 1)). [Working Group note: the terms, "building", "installation", "decoration" and "finishing" are derived from the List of Professional Trade Activities as set out in the Nomenclature of Industries in the European Communities (NICE), major group 40, "Construction", annexed to Council Directive of 26 July 1971 (C71/304/EEC) (Official Journal of the European Communities, No. L 185/1), (concerning the award of public works contracts).]

Subparagraph (e): "International tendering proceedings"

6. In tendering proceedings where it is sought to promote international participation, the procuring entity must employ certain procedures designed to be conducive to that participation (see commentary to article 11). The question of when international tendering proceedings are to be engaged in is dealt with in article 11.

* * *

Article 3. Underlying policies

(1) The underlying policies of this Law are:

(a) to maximize economy and efficiency in procurement;

(b) to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, international participation;

(c) to promote competition among contractors and suppliers for the supply of the goods or construction to be procured;

(d) to provide for the fair and equitable treatment of all contractors and suppliers in connection with procurement covered by this Law;

(e) to promote the integrity of, and fairness and public confidence, in the procurement process; and

(f) to achieve transparency in the procedures relating to procurement.

(2) This Law is subject to any international agreement, or any agreement with or other obligation towards an international institution or a governmental institution of another State, which has already been or may be entered into by [this State] and which contains provisions concerning the matters governed by this Law.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 15-27;
A/CN.9/315, paras. 9, 13-16, 122]

Paragraph (1)

1. The policies set forth in this paragraph serve as guidance in the interpretation and application of the model law; they do not themselves create substantive rights or obligations for procuring entities or for contractors or suppliers. The substantive provisions of the model law have been formulated with the objective of maximizing the possibility of achieving those policies and minimizing possible conflicts between them.

Subparagraphs (a), (b) and (c)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 16-20]

2. Economy and efficiency in expenditure of public funds are important to all countries. Economy refers to the procurement of goods or construction of the desired quality at the most advantageous price and upon the most advantageous contractual terms. It is promoted by procedures that provide a favourable climate for participation in procurement proceedings by competent contractors or suppliers, and that provide incentives to them to offer their most advantageous quality, price and other terms.

3. Efficiency in procurement is also an important policy underlying the model law since inefficient procurement procedures can delay the procurement and can unnecessarily add to the cost of administering the procurement proceedings by the procuring entity.

4. Two additional policies of the model law are to foster and encourage participation by competent contractors and suppliers in procurement proceedings and to promote competition among them. Competition can maximize economy in procurement by inducing contractors and suppliers to make their most advantageous offers. The broader the range of participation in procurement proceedings the more effective will be the competition and the greater will be the likelihood that the procuring entity will be able to obtain the most satisfactory terms.

5. The policy of fostering and encouraging international participation in procurement proceedings, where appropriate, is aimed at further enhancing the conditions leading to economy in procurement. (With respect to when foreign participation is "appropriate", see the commentary to article 11.) Foreign participation can expand the competitive base. In addition, it can lead to the acquisition by the procuring entity and its country of technologies that are not available locally. Foreign participation in procurement proceedings may be necessary where there exist no domestic sources for certain works or goods needed by the procuring entity. [Working Group note: see A/CN.9/315, paras. 9 and 122]. However, the model law recognizes the possibility of according preferential treatment to domestic contractors and suppliers in some cases in order to advance other economic objectives (see article 28(7)(d) and (e)).

Subparagraphs (d) and (e)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 21, 22; A/CN.9/315, para. 15]

6. Other important policies underlying the model law are to provide for fair and equitable treatment of all contractors and suppliers in connection with procurement covered by the Law and to promote the integrity of, and fairness and public confidence in, the procurement process. Thus, for example, the model law seeks to reduce misapplications and abuses of the procurement process by persons administering it and by contractors or suppliers participating in it (e.g., collusive tendering), and to ensure that procurement decisions are taken on a proper basis.

7. Promoting the integrity of the procurement process will help to promote public confidence in the process and in the public sector in general. Confidence in the procurement process on the part of competent contractors and

suppliers is necessary for their participation in procurement proceedings, and thus for the achievement of economy in procurement.

Subparagraph (f)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 26, 27]

8. The policy of achieving transparency in procurement laws and procedures is directed at helping to achieve other policy objectives already mentioned. Transparent laws are those in which the rules and procedures to be followed by the procuring entity and by contractors and suppliers participating in the procurement proceedings are fully disclosed, particularly to the participants and potential participants. Transparent procedures are those that enable participants to ascertain what procedures have been or will be followed by the procuring entity and the basis of decisions taken by the procuring entity.

9. Transparent procurement laws and procedures create predictability, enabling contractors and suppliers to calculate the costs and risks of their participation in procurement proceedings and thus to offer their most economical prices. They also help to guard against arbitrary or improper actions or decisions by the procuring entity or its officials and thus help to promote confidence in the procurement process. Transparency of procurement laws and procedures is of particular importance where foreign participation in procurement is sought, since foreign contractors and suppliers may be unfamiliar with a country's procurement practices.

Paragraph (2)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 9, 10, 38; the wording of the paragraph is adapted from article 90 of the United Nations Sales Convention.]

10. An implementing State may be subject to certain international agreements or obligations with respect to procurement. For example, a number of States and the European Economic Community (EEC) are parties to the GATT Procurement Agreement, and EEC members are bound by directives on procurement adopted by the Council of the EEC. In addition, many international lending institutions and national development funding agencies have established guidelines or rules governing procurement with funds provided by them. In their loan or funding agreements with those institutions and agencies, borrowing or recipient countries undertake that proceedings for procurement with those funds will conform to the guidelines or rules. Pursuant to paragraph (2) of the present article, if there is a conflict between a provision of the model law and the requirements under an applicable international agreement or other international obligation of the implementing State, the requirements of the international agreement or other international obligation are to be applied; but in all other respects the procurement is to be governed by the model law.

11. The model law is not subordinated to agreements with or obligations towards non-governmental institutions of another State (e.g., non-governmental commercial banks).

* * *

Article 4. Procurement regulations

The . . . [each State enacting this model law specifies the organ or

authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to elaborate upon or supplement this Law.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 30-34, 230, 231; A/CN.9/315, paras. 8, 10]

1. The model law is a "framework law"; that is, it sets forth basic legal rules governing procurement which are intended to be supplemented by detailed regulations promulgated by the appropriate organ or authority of the implementing State (see commentary to article 6). The "framework law" technique enables an implementing State to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances within the overall framework established by the Law.

2. Various provisions of the model law expressly provide for the elaboration or supplementation of those provisions by procurement regulations. Regulations may also be promulgated concerning other matters dealt with by the model law. In both cases, the regulations must be consistent with the model law.

* * *

Article 5. Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 26, 27, 36, 37; A/CN.9/315, para. 20]

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement. [Working Group note: the language is broadly based upon article VI(2) of the GATT Procurement Agreement.] In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be expected to be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign contractors and suppliers, in an appropriate manner.

2. Although the present article does not require it, it would be useful for participants or potential participants in procurement proceedings, especially

those from foreign countries, for the laws, regulations and other texts relating to procurement to be collected and published in a single publication made available to interested persons at a reasonable cost (e.g., the cost of publishing and distributing the publication).

3. The article requires administrative rulings and directives "of general application" to be made accessible to the public. The requirement does not apply to administrative rulings and directives that are directed to or concern individual contractors or suppliers.

* * *

Article 6. Control and supervision of procurement

(1) The approval function referred to in articles 7(2), 7(3), 11(2), 12(2), 28(3), 28(10), 29(1), 31(1), [32(1), and] [32(4)] shall be performed by ... [each State enacting this model law specifies the organ or authority authorized to perform the approval function.]

(2) [Each State enacting this model law specifies in this paragraph and, if necessary, in subsequent paragraphs, any additional functions in connection with the control and supervision of procurement and the organ[s] or authority[ies] to perform those functions.]

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 43-53;
A/CN.9/315, paras. 26-28]

1. With respect to paragraph (1), the approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g. a ministry of finance or of commerce, or a central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, countries may find it preferable for the approval function to be exercised by an organ or authority that is part of the governmental or administrative apparatus in order to ensure that the public policies that are sought to be advanced by the model law are given due effect. In any case, it is important that the organ or authority be sufficiently independant of the persons or department conducting or involved in the procurement proceedings, to be able to exercise its functions impartially and effectively. It may be preferable for the approval function to be exercised by a committee of persons, rather than by one single person.

2. In addition to designating the organ or authority to perform the approval function referred to in the preceeding paragraph, an implementing State may find it desirable to provide for functions directed to the overall supervision of and control over procurement to which the model law applies. All of those functions might be vested in a single organ or authority (e.g., a ministry of finance or of commerce, or a central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned below.

(a) Supervising overall implementation of procurement law and regulations. This may include, for example, monitoring implementation of the procurement law and regulations and making recommendations for their improvement. It may also include issuing interpretations of those laws. In some cases, e.g., in the case of high value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the model law and to the procurement regulations, before the contract can enter into existence.

(b) Rationalization and standardization of procurement and procurement practices. This may include, for example, co-ordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader Government policies. This may include, for example, examining the impact of procurement on the national economy, rendering advice on the effect of particular procurements on prices and other economic factors, and verifying that a particular procurement falls within the programmes and policies of the Government.

3. The organ or authority to exercise such functions in a particular implementing State, and the precise functions that the organ or authority is to exercise, will depend, for example, on the governmental, administrative and legal systems in the State, which vary widely from country to country. Each implementing State should formulate its own provisions taking into account its own circumstances, aided by the present commentary. It would be highly desirable for all such provisions to be contained in article 6, so as not to alter the numbering of the articles of the model law.

4. The system of administrative contol over procurement should be structured with the objectives of economy and efficiency in mind, since systems that are excessively costly or burdensome either to the procuring entity or to participants in procurement proceedings, or that result in undue delays in procurement, will be counterproductive. In addition, excessive control over decision-making by officials who carry out the procurement proceedings could in some cases stifle their ability to act effectively.

* * *

Article 7. Methods of procurement and conditions for their use

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) Subject to approval, the procuring entity may engage in procurement by means of competitive negotiation proceedings when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations; or

(b) tendering proceedings have been engaged in but:

(i) all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29; or

(ii) the contractor or supplier whose tender has been accepted fails to sign a procurement contract with the procuring entity when required to do so or fails to supply a required security for the performance of the contract, and no other responsive tender from an eligible and qualified contractor or supplier is in effect.

(3) Subject to approval, the procuring entity may engage in single source procurement when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods or construction is available only from the particular contractor or supplier or no reasonable alternative or substitute exists;

(c) there is an urgent need for the goods or construction making it impossible or imprudent to use tendering proceedings or competitive negotiation proceedings, as the case may be, because of the amount of time involved in using those proceedings;

(d) for reasons of standardization, or the need for compatibility with existing equipment or technology, goods must be procured from a particular contractor or supplier;

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) for reasons of national security there is a need for secrecy in respect of the procuring entity's procurement needs.

(4) The procuring entity shall not divide its procurement of the goods or construction into separate contracts for the purpose of invoking paragraph (2)(a) or (3)(a).

(5) A procuring entity that invokes the provisions of paragraph (2) or (3) shall include in the minutes required under article 34(4) or the record required under article 35 a statement of the circumstances on which it relied and, except in respect of paragraph (3)(f), shall specify the relevant facts.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 56-74; A/CN.9/315, paras. 29-34, 110, 113]

Paragraph (1)

1. The model law requires procuring entities to use tendering proceedings for their procurement, except in the circumstances specified in paragraphs (2) and (3) of the present article. This is because, in general, tendering

proceedings maximize economy and efficiency as well as the integrity of and confidence in the procurement process, thus promoting underlying policies of the model law (article 3(1)). The specified circumstances in which methods other than tendering proceedings may be used are, in principle, ones in which the use of tendering proceedings would be impracticable or imprudent or would otherwise not be best suited for pursuing the policies referred to in article 3(1). The use of methods other than tendering proceedings requires approval (see paragraph 1 of commentary to article 6).

[Working Group note: the approach adopted in this article, under which the procuring entity must use tendering proceedings except in specified cases, was the approach ultimately settled on by the Working Group at its tenth session (A/CN.9/315, paras. 32, 110 (especially last sentence) and 113 (especially last sentence)). Another approach that received support in the Working Group was that the model law should provide for various methods of procurement and enable the procuring entity to use whichever method it deemed to be most appropriate for a particular procurement, and should set forth criteria to guide procuring entities in making that choice (A/CN.9/315, paras. 33 and 34). For the possible consideration of the Working Group, language reflecting that approach is set forth below.

["(1) The procuring entity shall engage in procurement by whichever of the following methods it deems to be most appropriate, taking into consideration the circumstances of the procurement:

(a) tendering proceedings,
(b) competitive negotiation proceedings, or
(c) single source procurement proceedings.

["(2) In choosing the method of procurement to use the procuring entity shall:

(a) seek to maximize the promotion of the policies set forth in article 3(1); and

(b) take into account the following considerations:

(i) that tendering proceedings provide the greatest degree of competition and in many cases will best promote the policies set forth in article 3(1);

(ii) [other criteria to be formulated based on A/CN.9/315, para. 34, and A/CN.9/WG.V/WP.22, paras. 64 to 74.]"]

Paragraph (2)

2. "Competitive negotiation proceedings" is defined in article 2(h). The model law permits those proceedings to be used for procurement only in the exceptional circumstances set forth in paragraph (2) of this article. Subparagraph (a) calls for the procurement regulations to stipulate the amount below which competitive negotiation proceedings may be used (see article 4 and accompanying commentary). The principle underlying that subparagraph is that, in respect of procurement below the stipulated amount, the policies set forth in article 3 are less compelling than with respect to procurement over that amount, and the cost and time involved in engaging in tendering proceedings are therefore not justified. The amount set forth in the procurement

regulations should be determined in the light of that underlying principle. The procurement regulations might set forth two amounts: one for the procurement of goods and another for the procurement of construction.

3. Subparagraph (b) permits competitive negotiation proceedings to be used when, for the reasons specified, tendering proceedings have not resulted in a procurement contract. Subparagraph (i) is self-explanatory. With respect to subparagraph (ii), if another tender was in effect the procuring entity would be required to accept that tender and would not be permitted to resort to competitive negotiation proceedings. In such a case, the procuring entity would be able to exercise its rights against the failing contractor or supplier (e.g., under a tender security) to cover its losses arising from the failure.

Paragraph (3)

4. "Single source procurement" is defined in article 2(i). Procurement by that method is permitted only in the exceptional circumstances set forth in paragraph (3) of the present article.

5. With respect to subparagraph (a), the comments in paragraph 2 of this commentary (relating to paragraph (2)(a) of the present article) apply by analogy. It is contemplated that the amount referred to in subparagraph (3)(a) would be lower than the amount referred to in paragraph (2)(a).

6. Subparagraph (b) relates, for example, to cases in which the goods or construction required by the procuring entity are unique (e.g., works of art) or are subject to exclusive proprietary rights of the contractor or supplier. Note, however, that, under article 20, the procuring entity must formulate its procurement needs in an objective manner, to the extent possible, so as not to favour particular contractors or suppliers. Subparagraph (c) contemplates cases that are truly exceptional, and not merely cases of convenience.

[Working Group Note: the language of subparagraph (e) is adapted from article 6(4)(b) of the EEC Directive.]

7. Subparagraph (f) contemplates cases where public disclosure of the procuring entity's procurement needs, which would be necessary under tendering and competitive negotiation proceedings, would compromise national security.

Paragraph (4)

8. The purpose of paragraph (4) is to prevent abuses of paragraphs (2)(a) and (3)(a) by dividing procurement into separate contracts, each with estimated prices below the threshold amounts set forth in the procurement regulations, for the purpose of avoiding the use of tendering proceedings.

Paragraph (5)

9. Paragraph (5) provides another safeguard against the improper use of paragraphs (2) and (3) as a means of avoiding the use of tendering proceedings or competitive negotiation proceedings. It also promotes transparency of procurement proceedings. It is not sufficient for a procuring entity merely to re-state one of the justifying circumstances set forth in paragraph (2) or (3); it must also state facts in support thereof, except when invoking the "national security" exception (paragraph (3)(f)).

* * *

Article 8. Eligibility of contractors and suppliers

(1)(a) The procuring entity may require contractors and suppliers participating in procurement proceedings to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(i) have legal capacity to enter into the procurement contract;

(ii) are not insolvent, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in [this State];

(iv) have not been convicted of any criminal offense concerning their professional conduct within a period of [5] years preceeding the commencement of the procurement proceedings;

(v) [...] [each State enacting this model law specifies any additional eligibility requirements.]

(b) The procuring entity may, in addition, investigate by any other appropriate means the eligibility of a contractor or supplier pursuant to criteria set forth in subparagraph (a).

(2) Any requirement established pursuant to paragraph (1)(a) and the eligibility criteria set forth in that paragraph shall apply equally to all contractors and suppliers. A procuring entity shall impose no eligibility criterion other than those provided for in paragraph (1)(a).

[(3) A contractor or supplier shall not be precluded from participating in procurement proceedings for the reason that it does not conform to one or more eligibility criteria set forth in paragraph (1) if the contractor or supplier undertakes to establish its conformity during the course of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so.]

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 76-84;
A/CN.9/315, paras. 35-39]

1. This article establishes criteria concerning the eligibility of contractors or suppliers. Those criteria are distinct from qualification criteria that a procuring entity may impose pursuant to articles 9 and 15.

2. When tendering proceedings are engaged in, the eligibility criteria contained in paragraph (1)(a) must be set forth in the notice of proposed

procurement (article 14(1)(d)), in the prequalification documents (article 16(3)), and in the procurement documents (article 18(b)).

3. In some cases, an implementing State might wish to set forth in the Law additional eligibility criteria (e.g., that contractors and suppliers be enrolled on a commercial, professional or trade register in the State; or that the contractor or supplier has not, within a period of [5] years preceeding the commencement of the procurement proceedings, failed without legal justification to complete the performance of a contract with a procuring entity, or had such a contract terminated for reasons attributable to its fault). Such additional criteria could be set forth in paragraph (1)(a)(v) and subsequent subparagraphs, if needed. Any additional criteria should be restricted to those that are necessary to protect legitimate interests of the State or of the procuring entity, and, in the case of international tendering proceedings, should avoid unnecessary restrictions on or barriers to international participation. For example, a requirement that a contractor or supplier be enrolled on a commercial, professional or trade register should be accompanied by the proviso that, in international tendering proceedings, foreign contractors and suppliers have an equal opportunity to enroll. Paragraph (1)(a) should set forth all eligibility criteria that may be imposed; see paragraph (2).

4. The procuring entity may decide what type of written statements, documentary evidence or other information to require in particular procurement proceedings. When tendering proceedings are engaged in, such requirements must be specified in the prequalification documents (article 16(3)(d)) and in the procurement documents (article 18(d)). Rules concerning written statements and documentary evidence submitted by contractors and suppliers are set forth in article 10.

5. The required statements, documentation or information must be "appropriate". Its nature will depend on the circumstances of each procurement proceedings, such as the value of the goods or construction to be procured, and whether a broad range of contractors and suppliers that are not familiar to the procuring entity are expected to participate. For example, in proceedings for the procurement of high value equipment or industrial works, a procuring entity might require official certifications (e.g., from court, or tax or other authorities). In single source procurement proceedings for goods of relatively low value, the procuring entity might simply require the contractor or supplier to execute a standard form affidavit to the effect that the contractor or supplier conforms to all eligibility criteria. An intentional misstatement on the affidavit would be subject to sanctions under the applicable law. It is not in the interest of the procuring entity to require documentation beyond that necessary reasonably to satisfy it that the eligibility criteria are met.

[6. The purpose of paragraph (3) is to enable a contractor or supplier to participate in procurement proceedings even though it does not conform to an eligibility criterion or cannot establish its eligibility at the outset of the proceedings, and to give it an opportunity to establish its eligibility during the proceedings. However, it must establish its eligibility before it can enter into a procurement contract with the procuring entity.] [Working Group note: paragraph (3) and the commentary thereto have been placed within square brackets due to the differing views reflected in A/CN.9/315, para. 39.]

* * *

Article 9. Qualifications of contractors and suppliers

The procuring entity may require contractors and suppliers participating in procurement proceedings to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers possess sufficient qualifications with respect to technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract. Any such requirement, and any criterion established with respect to those qualifications, shall apply equally to all contractors and suppliers. A procuring entity may, in addition, investigate by any other appropriate means the qualifications of a contractor or supplier.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 85, 86; A/CN.9/315, para. 40]

It is essential that the contractor or supplier with which the procuring entity enters into a procurement contract be qualified to perform the contract. Further rules concerning the application of the present article in connection with tendering proceedings are set forth in articles 15 and 16.

* * *

Article 10. Rules concerning written statements and documentary evidence provided by contractors and suppliers

(1) This article applies to written statements and other documentary evidence provided by contractors and suppliers to demonstrate their eligibility and qualifications in procurement proceedings.

(2) A written statement, and documentary evidence other than that emanating from a governmental, judicial or administrative authority, shall be signed and sworn to or otherwise solemnized by the maker of the written statement or the documentary evidence before a notary or other authority competent under the law of the place where the authority serves to attest to the authenticity of the written statement or documentary evidence and to its signature and solemnization, and the attestation of the notary or other competent authority shall be affixed or joined to the written statement or documentary evidence. The attestation by a foreign notary or other competent authority shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(3) (a) Documentary evidence emanating from a governmental, judicial or administrative authority outside [this State] shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(b) Documentary evidence emanating from a governmental, judicial or administrative authority in [this State] shall conform to the law applicable in [this State] concerning the signature, solemnization and legalization of such documents.

* * *

Commentary

1. The purpose of this article is to establish international uniformity in the requirements relating to formalities to be complied with respect to written statements and other documentary evidence to be provided by contractors and suppliers. They also seek to remove unnecessary formal obstacles for foreign contractors and suppliers with respect to their provision of required written statements and documentary evidence.

2. With respect to paragraphs (2) and (3), in many States foreign attestations and documents must be legalised through the certification by diplomatic or consular agents of the country from which the document emanated of the capacity of the executor of the document and the authority of its signature and stamp or seal. However, some States are parties to international conventions liberalizing the formalities for authenticating public documents emanating from other parties to the Convention (e.g., the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Hague, 1961)). Compliance with the provisions of such a Convention would be sufficient under paragraph (2) and (3) in a State that is a party to the Convention.

3. One effect of paragraphs (2) and (3) is that the procuring entity may not reject a foreign attestation or documentary evidence purely on the ground of its foreign source. However, the word "acceptable", rather than, e.g., "accepted", is used in order to make it clear that the foreign attestation or document may be rejected if it does not conform in other respects.

* * *

CHAPTER II. TENDERING PROCEEDINGS

SECTION I. INTERNATIONAL TENDERING PROCEEDINGS

Article 11. International tendering proceedings

(1) Subject to paragraph (2), a procuring entity that is required under article 7 to engage in tendering proceedings may decide to engage in international tendering proceedings, taking into account the objectives of economy and efficiency in the procurement.

(2) Where the price of the procurement contract exceeds the amount set forth in the procurement regulations, a procuring entity that is required under article 7 to engage in tendering proceedings must engage in international tendering proceedings unless it receives approval not to engage in international tendering proceedings. The procuring entity shall not divide its procurement of the goods or construction into

separate contracts for the purpose of avoiding the application of this paragraph.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 14; A/CN.9/315, para. 122]

1. In many cases, it is in the interest of the procuring entity to promote international participation in tendering proceedings (see paragraph 5 of commentary to article 3). The present article in effect calls upon a procuring entity that is obligated under article 7 to engage in tendering proceedings to determine whether international participation would be advantageous, and thus whether to engage in international tendering proceedings. When it decides to engage in international tendering proceedings the particular procedures specified for those proceedings in chapter II of the model law, which are designed to be conducive to international participation, must be employed.

2. In deciding whether or not to engage in international tendering proceedings the procuring entity must take into account the objectives of economy and efficiency in the procurement. Relevant factors might include, for example, the value of the goods or construction to be procured (e.g., whether the cost and time involved in employing international procedures is disporportionate to the value of the goods or construction), and whether a sufficient degree of competition would exist in the tendering proceedings if foreign participation were not promoted. The non-availability of the goods or construction from domestic contractors or suppliers might also be relevant.

3. The rationale of paragraph (2) is that, where the price of the procurement contract exceeds a certain value, promoting foreign participation in the tendering proceedings is likely to promote economy and efficiency. There could be cases, however, where the procuring entity concludes that using procedures to promote foreign participation would not promote those objectives; in those cases, the non-use of those procedures must be approved (see paragraph 1 of commentary to article 6).

* * *

SECTION II. SOLICITATION OF TENDERS AND APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and applications to prequalify

(1) A procuring entity shall solicit tenders, and, where applicable, applications to prequalify, from all interested contractors and suppliers by causing a notice of proposed procurement to be published in . . .[each State enacting this model law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published]. In international tendering proceedings, the notice of proposed procurement shall also be published in a newspaper or relevant trade publication or technical journal of wide international circulation. The publication shall be in a language customarily used in international trade.

(2) Where restricted participation in the tendering proceedings is more conducive to economy and efficiency, the procuring entity may, subject to approval, solicit tenders by sending the notice of proposed procurement only to particular contractors and suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 58, 67, 72, 73; 95-99, A/CN.9/315, paras. 31, 45]

1. The model law provides for two types of tendering proceedings: open and restricted. In open tendering proceedings, tenders or applications to prequalify (see article 16) are solicited from all interested contractors and suppliers. In restricted tendering proceedings, tenders are solicited only from particular contractors and suppliers selected by the procuring entity. Prequalification proceedings are not used in restricted tendering proceedings (see paragraph 2 of commentary to article 16).

2. Although participation in restricted tendering proceedings is not open to contractors and suppliers generally, restricted proceedings are not intended to be less competitive than open proceedings. In some cases (e.g., those mentioned later in this paragraph), restricted proceedings can be a more efficient means of procurement than open tendering proceedings while still providing competition. This article therefore gives the procuring entity the opportunity, subject to approval (see paragraph 1 of the commentary to article 6), to engage in restricted tendering proceedings when those proceedings are more conducive to economy and efficiency in the procurement. Considerations such as the following may be relevant in ascertaining whether, for a particular procurement, restricted tendering proceedings should be used.

(a) The use of open tendering proceedings may result in a large number of tenders that the procuring entity will have to examine, evaluate and compare, and the time and costs of doing so might in some cases be disproportional to the value of the goods or construction to be procured.

(b) In cases where the goods or construction are available only from a few contractors or suppliers, which are known to the procuring entity, it could be more efficient for tenders to be solicited only from those contractors or suppliers through restricted tendering procedures rather than to engage in a general solicitation through open tendering procedures.

(c) Competent contractors and suppliers are sometimes deterred from participating in open tendering proceedings, particularly for the procurement of goods or construction of high value, where the cost of preparing tenders is high and the statistical chance of being the successful tenderer is low due to the potentially large number of tenderers.

3. In some regions, participation in tendering proceedings is sometimes limited to persons or entities that have purchased the procurement documents. Proceedings in which that practice is followed may be regarded as open tendering proceedings if the opportunity to purchase the procurement documents is available to all interested contractors and suppliers. A reason for that practice is to avoid the problems that could arise if a contractor or supplier submitted a tender on the basis of procurement documents that had been incompletely or inaccurately copied by someone without authority to copy the documents. An argument against following that practice, however, is that consulates or other governmental offices of certain countries sometimes obtain and copy procurement documents and distribute them to contractors and suppliers that might be interested in participating in procurement. That can help to promote awareness by contractors and suppliers from those countries of procurement opportunities.

4. Paragraph (1) of this article sets forth the requirements with respect to the solicitation of tenders or applications to prequalify in open tendering proceedings. Its objective is to maximize the potential competitive base through the widespread publicity of a notice of proposed procurement. The publication required by the second sentence of the paragraph is intended to bring the notice of proposed procurement to the attention of foreign contractors and suppliers in the case of international tendering proceedings. One possible medium of such publication is the business edition of Development Forum, published by the United Nations Department of Public Information and the United Nations University.

5. The media of publication specified in paragraph (1) are only minimum publicity requirements. Procuring entities may publicize the notice by any additional means that will promote widespread awareness of it by contractors and suppliers. These might include, for example, posting the notice on official notice boards, and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity. The procuring entity might also send the notice to contractors or suppliers on lists of approved contractors or suppliers; however, participation in open tendering proceedings should not be limited to contractors or suppliers on those lists. An implementing State might wish to specify in the procurement regulations the media of publication to be used under paragraph (1).

6. The publication of the notice of proposed procurement is relevant for fixing the deadline for the submission of tenders (see article 24(1)).

7. Paragraph (2) deals with the solicitation of tenders in restricted tendering proceedings. [Working Group note: the second sentence is adapted from article V(6) of the GATT Procurement Agreement.]

* * *

Article 13. Lists of approved contractors and suppliers

The procuring entity may use a list of approved contractors and suppliers as its source for the selection of contractors and suppliers from which to solicit tenders pursuant to article 12(2) only if:

(a) requests to be entered on the list are receivable at any time from any interested contractor or supplier and are acted upon within a reasonably short period of time;

(b) entry on the list is subject to no eligibility criterion more stringent than those set forth in article 8(1)(a) and is subject to no qualification criterion more stringent than those established pursuant to article 15;

(c) the existence of the list, the conditions to be satisfied by contractors and suppliers in order to be entered on the list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and for renewal of the entry have been generally publicized in a manner designed to bring them to the attention of contractors and suppliers;

(d) the conditions, methods, procedures and other matters referred to in subparagraph (c) do not discriminate against foreign contractors and suppliers with respect to entry on a list used for the solicitation of tenders in international tendering proceedings or with respect to their opportunity to participate in such proceedings; and

(e) the selection by the procuring entity from the list allows all contractors or suppliers on the list equitable opportunities to be selected.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 94; A/CN.9/315, para. 44. Most of the subparagraphs of this article are adaptations of provisions of the GATT Procurement Agreement: subparagraph (a) is adapted from article V(2)(d) of the GATT Procurement Agreement; subparagraph (c) from article V(7)(a); subparagraph (d) from article V(2)(b) and (c); subparagraph (e) from article V(7)(b).]

1. This article concerns the use of lists of approved contractors and suppliers as the source for the selection of contractors and suppliers to participate in restricted tendering proceedings. Its purpose is to ensure that the procuring entity has a sufficiently broad field from which to make its selection in order to improve its chances of finding the most suitable contractor or supplier for the procurement and to ensure that the use of the list does not inhibit effective competition or unfairly exclude contractors and suppliers. [Working Group note: the article has not been made applicable in respect of open tendering proceedings for the following reasons. Participation in those proceedings is open to all interested contractors and suppliers, who must be informed of the opportunity to participate by means of widespread publication of the notice of proposed procurement, and by such additional means as the procuring entity may consider appropriate. Lists of approved contractors or suppliers are sometimes used as one of those additional means (e.g., as a mailing list; see paragraph 5 of commentary to article 12). Since the use of such lists is only one means of soliciting tenders in open tendering proceedings, their use does not present the same risks as does the use of lists in restricted tendering proceedings.]

2. With respect to Subparagraph (b), entry on the list need not be subject to all of the same eligibility and qualification criteria that are authorized by articles 8(1)(a) and 15; but it may not be subject to more stringent ones.

3. Under subparagraph (d), in the case of international procurement proceedings, the list could not be used if, for example, the conditions, methods, procedures or other matters precluded foreign contractors or suppliers from entry on the list, or if the entry of foreign contractors or suppliers on the list was subject to undue delays to which domestic contractors or suppliers were not subject, impeding the ability of foreign contractors or suppliers to become entered in time to participate in particular tendering proceedings. However, not all differences between the treatment of foreign contractors or suppliers and the treatment of domestic ones would be impermissible under this provision. For example, delays in entering foreign contractors or suppliers on the list might reflect a greater amount of time reasonably needed to process foreign requests for entry.

* * *

Article 14. Contents of notice of proposed procurement

(1) The notice of proposed procurement shall contain the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the eligibility criteria set forth in article 8(1)(a);

(e) the means of obtaining the procurement documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the procurement documents and, in the case of international tendering proceedings, the currency and means of payment for those documents;

(g) in the case of international tendering proceedings, the language or languages in which the procurement documents are available;

(h) the place and deadline for the submission of tenders.

(2) If prequalification proceedings are to be engaged in, the notice of proposed procurement shall so state. In such a case, the notice of proposed procurement need not contain the information referred to in paragraph (1)(e) or (g), but shall contain the following additional information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents and, in the case of international tendering proceedings, the currency and terms of payment for those documents;

(c) in the case of international tendering proceedings, the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

* * *

Commentary

[Working Group notes: sources: A/CN.9/WG.V/WP.22, para. 95; A/CN.9/315, para. 45]

1. Paragraph (1) sets forth basic information that must be included in the notice of proposed procurement in order to enable contractors and suppliers to determine whether they might be sufficiently interested in the proposed procurement to obtain the tender documents and, if so, how to obtain them. The specified information is only the required minimum.

2. Paragraph (2) sets forth additional information that must be included in the notice of proposed procurement if prequalification procedures are to be engaged in (see article 16). In such a case, it is not necessary for the notice to include information concerning the procurement documents, since those documents will be provided to contractors and suppliers that have been prequalified (article 17).

* * *

SECTION III. QUALIFICATIONS OF CONTRACTORS AND SUPPLIERS

Article 15. Assessment of qualifications of contractors and suppliers

(1) The procuring entity shall assess the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents or in the procurement documents.

(2) The qualification criteria shall be objective to the extent possible and shall be limited to those which are essential to ensure that the contractors or suppliers possess sufficient technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract.

(3) In the case of international tendering proceedings, the procuring entity shall establish no criterion, requirement or procedure with respect to the demonstration or assessment of the qualifications of contractors and suppliers which unduly hinders the ability of foreign contractors and suppliers to show that they are qualified.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 85-89; A/CN.9/315, paras. 40, 41]

1. This article sets forth rules applicable to tendering proceedings, including, where applicable, prequalification proceedings, concerning the qualifications of contractors and suppliers to perform the procurement contract (see article 9). If contractors and suppliers have not been prequalified (see article 16), the procuring entity assesses their qualifications after the opening of tenders. In some cases where contractors and suppliers have been prequalified, their qualifications may be assessed more closely after the opening of tenders. A procuring entity may also conduct post-qualification proceedings to establish that the qualifications of the contractor or supplier submitting the most advantageous tender have not changed.

2. In order to promote transparency, the qualification criteria and the procedures for assessing the qualifications of contractors and suppliers must be set forth in the prequalification documents (article 16(3)(e)) and in the procurement documents (article 18(c)).

3. The aim of paragraphs (1) and (2) is to help ensure that all contractors and suppliers are treated on the same basis and to avoid arbitrariness in the evaluation of qualifications. They also aim to provide a degree of certainty to contractors and suppliers with respect to the prospects of their being found to be qualified. These aims contribute to a procedural climate that is conducive to participation by contractors and suppliers in tendering proceedings. With respect to the requirement that the qualification criteria be objective to the extent possible, the criteria should establish minimum thresholds of acceptability, e.g., that the contractor or supplier shall have supplied goods or performed construction of a similar nature at least once within the past five years.

4. Contractors and suppliers are often called upon to complete a questionnaire eliciting information about various aspects of their qualifications, and to submit other documents (e.g., balance sheets; bank references) to demonstrate their conformity with the qualification criteria. The requirements in that respect must be set forth in the prequalification documents (article 16(3)(d)) or in the procurement documents (article 18(d)). as the case may be. The provisions of article 10, relating to the solemnization and legalization of written statements and documents, apply to such questionnaires and documents. See, also, article 9 and the commentary thereto.

5. With respect to paragraph (3), if, for example, bank references are required but there is no particular necessity for the references to be from banks in the country of the procuring entity, the procuring entity should permit foreign contractors or suppliers to submit references from reputable foreign banks.

* * *

Article 16. Prequalification proceedings

(1) Except where participation in tendering proceedings is restricted pursuant to article 12(2), the procuring entity may engage in prequalification proceedings with a view towards identifying, prior to

the submission of tenders, contractors and suppliers that are eligible and qualified to perform the procurement contract.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the notice of proposed procurement and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain all information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to, the information required to be included in the notice of proposed procurement pursuant to article 14(1), except subparagraph (e) thereof, plus the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) any additional information concerning the goods to be supplied or the construction to be effected that would be useful to contractors or suppliers in preparing their prequalification applications;

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the criteria and procedures to be used for assessing the qualifications of contractors and suppliers;

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers;

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the prequalification proceedings.

(4) The procuring entity shall promptly notify all contractors and suppliers submitting applications to prequalify whether or not they have been prequalified and shall make available to the general public the names of all contractors and suppliers that have been prequalified. All contractors and suppliers that have been prequalified shall be entitled to submit tenders.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefor, but the procuring entity shall not be required to give reasons to substantiate those grounds.

(6) A procuring entity that has engaged in prequalification proceedings is not precluded from re-assessing at a later stage of the tendering proceedings the eligibility and qualifications of contractors and suppliers that have been prequalified.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 85 (last 2 sentences), 90-93; A/CN.9/315, paras. 42, 43, 103]

1. This article enables the procuring entity to engage in prequalification proceedings wherever it considers such proceedings useful. The purpose of prequalification proceedings is to eliminate early in the tendering proceedings contractors and suppliers that are not eligible or not suitably qualified to perform the contract and to narrow down the number of tenders that the procuring entity must evaluate and compare. In practice, prequalification proceedings are most often used for procurement of complex or high value goods and construction. The reason for this is that the evaluation and comparison of tenders in those cases is much more complicated, costly and time-consuming than the evaluation and comparison of tenders for less complex or lower value contracts. In addition, competent contractors and suppliers are sometimes reluctant to participate in tendering proceedings for high value contracts, where the cost of preparing the tender may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders submitted by unqualified or disreputable contractors and suppliers. For less complex or lower value contracts, it is often more efficient to evaluate the qualifications of contractors and suppliers after the opening of tenders than to conduct separate prequalification proceedings.

2. Prequalification proceedings may be engaged in only in connection with open tendering proceedings; they are unnecessary in restricted tendering proceedings. Indeed, prequalification proceedings should be used only as a method of identifying and eliminating clearly unqualified contractors and suppliers at an early stage, and not as means of restricting participation to particular contractors and suppliers; restricted tendering proceedings are available for the latter purpose.

3. Paragraphs (2) through (5) govern the procedures to be followed in prequalification proceedings. Like the open tendering proceedings with which they are connected, prequalification proceedings are, pursuant to paragraph (2), open to all interested contractors and suppliers that properly request the prequalification documents. Under article 14(2), notice that prequalification proceedings will take place and related information must be included in the notice of proposed procurement for open tendering proceedings, and the notice should thus receive widespread publicity.

4. Paragraph (3) sets forth the information that must be included in the prequalification documents, making it clear that this is only the minimum information to be provided; the documents may also contain further information

that would assist contractors and suppliers in preparing and submitting their applications to prequalify. These requirements are analogous to those set forth in article 18 in relation to the information to be provided in the procurement documents. The commentary to that article is thus also relevant in the present context. Article 20 sets forth rules concerning the formulation of the prequalification documents.

5. The assessment of the qualifications of contractors and suppliers in prequalification proceedings is subject to the provisions of article 15.

6. The purpose of paragraph (5) is to promote transparency and to facilitate the exercise by a contractor or supplier that has not been prequalified of its right of redress.

7. With respect to paragraph (6) see paragraph 1 of the commentary to article 15.

* * *

SECTION IV. PROCUREMENT DOCUMENTS

Article 17. Provision of procurement documents to contractors and suppliers

The procuring entity shall provide a set of the procurement documents to contractors and suppliers in accordance with the procedures and requirements specified in the notice of proposed procurement. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of the procurement documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 100]

This article is self-explanatory. See paragraph 3 of commentary to article 12.

* * *

Article 18. Contents of procurement documents

The procurement documents shall contain all information necessary to enable contractors and suppliers to prepare and submit responsive tenders, including, but not limited to, the following information:

(a) instructions for preparing tenders;

(b) the eligibility criteria set forth in article 8(1)(a);

(c) if the qualifications of contractors and suppliers are to be assessed or re-assessed after the opening of tenders, the criteria and procedures to be used for the assessment or re-assessment;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the nature and required technical and quality characteristics of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(f) the required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(g) whether alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents are solicited;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a specification of the portion or portions for which tenders may be submitted;

(i) the manner and, in international tendering proceedings, the currency or currencies in which the tender price is to be formulated and expressed;

(j) any applicable maximum or minimum tender price, or any applicable range within which tender prices must fall or the formula to be used to establish such range;

(k) in international tendering proceedings, the language or languages in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, and with respect to the type or types of institutions or entities from which such securities will be acceptable;

(m) the manner, place and deadline for the submission of tenders;

(n) the means by which, pursuant to article 24, contractors and suppliers may seek clarifications of the procurement documents and the place and time of any meeting of contractors and suppliers convened by the procuring entity;

(o) the period of time during which tenders shall be in effect;

(p) the place, date and time for the opening of tenders, the procedures to be followed for opening, examining, evaluating and comparing tenders and for ascertaining the most advantageous tender, and the criteria to be used for evaluating and comparing tenders and

for ascertaining the most advantageous tender, including, but not limited to, such factors as how the criteria will be quantified or otherwise applied, the relative weight or other indication of the degree of importance that each criterion will have, the manner in which the criteria will be combined and in which the tenders will be compared in order to ascertain the most advantageous tender, and any margin of preference that will be applied, its amount and the manner of its application;

(q) in international tendering proceedings, the currency that will be used for the purpose of evaluating and comparing tenders and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate issued by a specified financial institution prevailing on a specified date will be used;

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the tendering proceedings;

(s) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the tendering proceedings [, and references to tax, social security, safety, environmental protection, health and labour laws and regulations of [this State] pertinent to the performance of the procurement contract];

(t) the name(s) and address(es) of the person or persons authorized to communicate with contractors and suppliers in connection with the tendering proceedings and to whom communications from contractors and suppliers should be addressed.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 100-106, 123-126; A/CN.9/315, paras. 46-50, 60-66]

1. This article specifies the minimum information that must be included in the procurement documents. Many of those items are regulated or dealt with in other provisions of the model law. The enumeration in this article of all items that are required to be in the procurement documents, and all items the inclusion of which is expressly provided for by the model law, enables procuring entities to use the paragraph as a "check-list" in preparing the procurement documents. The term "responsive tender" used in the chapeau to this article is defined in article 28(4).

2. The instructions for preparing tenders referred to in subparagraph (a) should include, among other things, information concerning the form and manner of signature of tenders, and the manner in which the various documents comprising the tender are to be organized (e.g., if the "two-envelope" system is to be used (see paragraph 23 of commentary to article 28).

3. Subparagraphs (e) and (f) refer to the required characteristics of the goods or construction and the required terms and conditions of the procurement

contract. Tenders will have to conform to those characteristics, terms and conditions in order to be regarded as responsive (article 28(4)). Characteristics, terms and conditions that are not required by the procuring entity are matters in respect of which tenderers may make offers in their tenders and which will constitute elements of the competition among tenderers (see article 28(7)(c)(ii) and paragraph 14 of the commentary to article 28).

4. With respect to the required terms and conditions of the anticipated procurement contract, a copy of the conditions of contract that will become part of the procurement contract is often included in the procurement documents. The terms and conditions should, when feasible, refer to internationally recognized trade terms and terminology such as INCOTERMS (see article 20(3)(b) and (c)). Requirements such as an obligation of the contractor or supplier to provide financing should be set forth in the procurement documents.

5. With respect to the formulation of the tender price, (subparagraph (i)), the procurement documents should, for example, specify whether and how contractors and suppliers are to take account of taxes, customs duties and similar charges and levies in formulating the tender price, and the trade terms on which prices are to be based (e.g., ex works, FOB or CIF terms) (see article 20(3)). Such specifications can help ensure that tender prices will be formulated and expressed on a common basis and will therefore be susceptible of uniform comparison.

6. Various approaches are possible with respect to the role of taxes, customs duties and similar charges and levies in formulating the tender price. Under one approach, the procurement documents may require contractors and suppliers to include all such charges and levies in their tender prices, with no right on the part of the contractor or supplier whose tender is accepted to reimbursement from the procuring entity for any charges or levies not included in the tender price. Another approach requires contractors and suppliers to formulate their prices excluding such charges and levies, and permits them to claim reimbursement from the procuring entity for any charges and levies actually paid by them. The latter approach may be more desirable when foreign participation in the tendering proceedings is anticipated or sought. It may be difficult and time-consuming for foreign contractors and suppliers to obtain the information necessary to calculate those charges and levies, particularly with respect to taxes imposed by the country of the procuring entity. In addition, those taxes are sometimes uncertain; for example, procuring entities are sometimes able to obtain tax reductions or other fiscal advantages, particularly where high value contracts or other contracts of special interest to the Government are involved. Thus, different contractors and suppliers may calculate the taxes differently, making it difficult or impossible to make a true comparison of their tender prices. [The contractual terms and conditions included in the procurement documents should clarify which party is to bear the risk of increases in taxes, customs duties or similar charges and levies, or the imposition of new taxes, customs duties or similar charges and levies, to which the contractor or supplier becomes subject in the country of the procuring entity after a specified time (e.g., within 30 days prior to the deadline for the submission of tenders). It might be provided, for example, that the procuring entity is to bear that risk.] [Working Group note: the foregoing sentences within square brackets might be included if article 21 is not included.]

7. With respect to trade terms, various approaches are possible. Under one approach the price is to be the total price for delivery to the procuring entity, including, for example, freight and insurance charges. In some cases, however, the procuring entity may wish to provide the transport or insurance (e.g., it may wish to use domestic carriers or insurers in order to promote those domestic industries or to conserve foreign exchange). In such a case, the procuring entity might require contractors and suppliers to base their prices on, for example, FOB terms, or to base their prices on CIF terms but to show separately the FOB price, freight charges to the port of entry in the procuring entity's country, costs of delivery to the procuring entity, and insurance costs. In the latter case, the procuring entity can then decide whether to contract with the successful tenderer on the CIF terms or to contract on the FOB terms and to provide its own transport or insurance.

8. In international tendering proceedings, the procurement documents must specify the currency or currencies in which tender prices are to be expressed. Such currencies might include, for example, the currency of the country of the procuring entity, the currency of the contractor's or supplier's country and a currency customarily used in international trade. Contractors and suppliers might also be permitted to express portions of the tender price in two or more different currencies in which they will incur their expenditures in respect of the goods or construction that they offer to supply. Permitting tender prices to be expressed in currencies other than the currency of the country of the procuring entity can promote economy in procurement when foreign contractors and suppliers participate in the tendering proceedings because they enable those contractors and suppliers to reduce the risk of exchange rate fluctuations to which they would be subject if their tenders were expressed in the currency of the country of the procuring entity. This can enable the contractors and suppliers to offer their most economical prices, without having to include an increment to cover the exchange rate risk. Under that approach, however, the risk of exchange rate fluctuations will be increased for the procuring entity. Moreover, the submission of tenders with tender prices expressed in various currencies will complicate the process of evaluating and comparing tenders, since the tender prices will have to be converted to a single currency (article 28(8)). As a means of reducing and sharing the risk of exchange rate fluctuations and reducing the other disadvantages that can accrue when tender prices are expressed in several currencies contractors and suppliers might be called upon to express their tender prices in a relatively stable unit of account, such as the Special Drawing Right (SDR) of the International Monetary Fund.

9. In practice, procuring entities sometimes require contractors and suppliers to disclose the components and calculations of their tender prices, including the way in which profit is factored into the prices. This sometimes enables procuring entities to ascertain whether the tender prices are realistic or fair. However, contractors and suppliers often regard such information as confidential and imposing such requirements could dissuade some contractors or suppliers from participating in tendering proceedings.

10. With respect to subparagraph (p), the opening of tenders must take place at the time set forth in the procurement documents as the deadline for the submission of tenders (article 27(1)).

11. With a view towards promotion of transparency, subparagraph (s) requires that the procurement documents alert contractors and suppliers to the model law, the procurement regulations and all other laws and regulations of the

implementing State directly pertinent to the tendering proceedings. Those other laws and regulations, in particular, might not otherwise ordinarily come to the attention of foreign contractors and suppliers. They might include, for example, laws and regulations relating to stamps required to be affixed to a tender, or requiring a copy of a tender to be submitted to a particular office. [In addition, the procurement documents must set forth references to the other specified types of laws and regulations pertinent to the performance of the procurement contract.] [Working Group: that provision and the preceding sentence have been placed within square brackets to invite the Working Group to consider whether such references should also be required.]

12. The requirement in subparagraph (t) is intended to avoid questions or misunderstandings with respect to the proper addressee of communications to the procuring entity and the authority of employees of the procuring entity to communicate with contractors and suppliers. The authorized person might, for example, be the chief procurement officer of the procuring entity.

13. In addition to the information required by this article, it would be desirable for the procurement documents to include a form of tender on which contractors and suppliers are to set forth their tender prices and other basic elements of their tenders and which they are to sign. Providing such a form could contribute to uniformity of presentation and efficiency in the examination, evaluation and comparison of tenders. It would also be desirable for the procurement documents to include forms of any required securities so as to help ensure that the securities submitted by contractors and suppliers will conform to the procuring entity's requirements. See, also, paragraph 4 of the commentary to article 26.

* * *

Article 19. Charge for procurement documents

The procuring entity may charge contractors and suppliers a sum for procurement documents provided to them. The sum shall reflect only the cost of printing the procurement documents and providing them to contractors and suppliers.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 107-109; A/CN.9/315, para. 51]

The aim of this article is to enable the procuring entity to recover its costs of printing and providing the procurement documents, but to avoid excessively high charges that could inhibit qualified contractors and suppliers from participating in the tendering proceedings.

* * *

Article 20. Rules concerning formulation of prequalification documents and procurement documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be

procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the procurement documents with a view to creating obstacles to participation by contractors or suppliers in tendering proceedings including, in the case of international procurement proceedings, foreign contractors and suppliers, nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used which have the effect of creating unnecessary obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the procurement documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the procurement documents.

(c) In the case of international procurement proceedings, internationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available; if they are not available, nationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available.

(4) In the case of international procurement proceedings, the prequalification documents and the procurement documents shall be formulated in . . . [each State enacting this model law specifies its official language or languages] [and in a language customarily used in international trade]. [In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail.]

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 110-114; A/CN.9/315, paras. 52-55]

[Paragraph (1) is based on article IV(1) of the GATT Procurement Agreement; paragraph (2) is based on article IV(3) of the GATT Procurement Agreement.]

1. To the extent possible, the prequalification documents and the procurement documents should be formulated in a clear, complete and objective manner, particularly with respect to the description of the goods or construction to be procured. Procurement documents with those characteristics enable tenderers to formulate tenders that meet the needs of the procuring entity, and to forecast the risks and costs of their participation in the tendering proceedings and of the performance of the contract to be concluded, and thus to offer their most advantageous prices and other terms and conditions. They enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. The present article is intended to promote those objectives.

2. With respect to paragraph (3), see paragraphs 4 and 7 of the commentary to article 18. Paragraph (4) is intended to help make the procurement documents understandable to foreign contractors and suppliers. The reference to a language customarily used in international trade and the final sentence within square brackets need not be adopted by an implementing State whose official language is one customarily used in international trade.

* * *

[Article 21. <u>New or amended laws or regulations relating to taxes, customs duties or similar charges, or affecting performance of procurement contract</u>]

[The procurement contract shall provide for the procuring entity to bear any extra costs incurred by the contractor or supplier that becomes a party to the procurement contract due to new or changes in laws or regulations of [this State] relating to taxes, customs duties or similar charges, or affecting the performance by the contractor or supplier of the procurement contract, that come into force after the date [30] days prior to the deadline for submission of tenders.]

* * *

[<u>Commentary</u>]

[1. The reason for this provision is that, in formulating their tenders, contractors and suppliers will assess their costs and compute their tender prices on the extent of their obligations under laws and regulations in existence at the time they prepare their tenders. Any increases in costs to the contractor or supplier due to subsequent changes in the laws and regulations referred to should be borne by the procuring entity. The [30] day time period is chosen because changes occurring after that date may not come to the attention of contractors and suppliers in time to make any necessary alterations to their tenders prior to the deadline for submitting tenders.]

[2. Where contractors and suppliers are to exclude taxes from the formulation of their tender prices and may claim reimbursement from the procuring entity for taxes actually paid (see paragraph 6 of commentary to article 18), a contractor or supplier would not incur any extra costs as a result of new taxes or changes in tax laws, and the contractual provision required by the present article would not be applicable in such a case.]

[<u>Working Group note</u>: this article and commentary have been placed within

square brackets to invite the Working Group to consider whether or not such an article should be included. In principle, the model law deals only with the procedures for procurement and not matters relating to the substance of the contract (see A/CN.9/315, para. 14). However, some experts in procurement consulted by the Secretariat have suggested that such a provision would be useful.]

* * *

Article 22. Clarifications and modifications of procurement documents

(1) A contractor or supplier requiring a clarification of the procurement documents shall communicate a request for such clarification to the procuring entity. The procuring entity shall respond promptly to any request for clarification that is received by it prior to the deadline for submission of tenders. Copies of the response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own intiative or in response to a clarification requested by a contractor or supplier, modify the procurement documents by issuing an addendum thereto. The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the procurement documents and shall be binding on them.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the procurement documents shall be made in writing or in any other form that preserves a record of the request, response or addendum.

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the procurement documents, without identifying the sources of the requests, and its responses to those requests. The minutes shall be prepared in writing or in any other form that provides a record of the information contained therein and shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 115-119; A/CN.9/315, paras. 56-58]

1. Any clarification and modification of the procurement documents should be issued and communicated in time to enable contractors and suppliers to take appropriate action, such as modifying or withdrawing their tenders. Under article 25(3), tenders may be modified or withdrawn only prior to the deadline for the submission of tenders. If a clarification or modification of the procurement documents is issued or communicated at a time too close to the deadline, the procuring entity may have to extend the deadline in order to enable contractors and suppliers to take appropriate action (see article

24(2)). In such a case, the time of opening tenders will have to be extended (see article 27(1)) and the procuring entity will have to request contractors and suppliers to extend the period of effectiveness of their tenders and of their tender securities (see article 25(2). In addition, in some cases, the time for the performance of the procurement contract may have to be extended.

2. With respect to paragraph (4), a meeting of contractors and suppliers may be a useful and efficient manner of dealing with requests for clarifications of the procurement documents in cases where the procurement documents are lengthy and complex and the value of the goods or construction is high. The procurement regulations might set forth rules concerning such meeting, for example, requiring all requests for clarifications to be submitted in writing.

* * *

SECTION V. TENDERS

Article 23. Language of tenders

Tenders shall be formulated and submitted in . . .[each State enacting this model law specifies its official language or languages]. In international tendering proceedings, at the option of the contractor or supplier, tenders may be formulated and submitted in any language in which the procurement documents have been issued.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 121, 122; A/CN.9/315, para. 59]

See article 20(4), dealing with the language of the procurement documents.

* * *

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for contractors and suppliers to prepare and submit their tenders, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers.

(2) (a) The procuring entity may, prior to the deadline for submission of tenders, extend the deadline:

(i) in order to afford contractors and suppliers reasonable time to take into account in their tenders a response by the procuring entity to a request for clarification of the procurement documents or a modification of those documents, or

(ii) if, due to unforeseen circumstances, it is not possible for contractors or suppliers to submit their tenders by the deadline.

(b) Notice of any extension of the deadline shall be given promptly in writing or in any other form that provides a record of the information contained therein to each contractor and supplier to which the procuring entity provides the procurement documents.

(3) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened or considered and shall be returned to the contractor or supplier that submitted it. [However, a tender submitted after the deadline may be considered if the contractor or supplier was not able to submit its tender by the deadline due to reasons beyond its control.]

(4) Tenders shall be submitted in writing and in sealed envelopes. [However, the procuring entity may give contractors and suppliers the option to submit tenders by any other means that provides a record of the information contained in the tender.] The procuring entity shall provide to the contractor or supplier a receipt showing the date and time when the tender was received.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 127-134; A/CN.9/315, paras. 67-69]

1. The procuring entity is to fix the deadline by which tenders must be submitted. In fixing the deadline, the procuring entity should take into account such factors as the complexity of the goods or construction to be procured, the extent of subcontracting anticipated and the time needed for transmitting tenders, particularly, in the case of international tendering proceedings, from foreign points. An implementing State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow for the submission of tenders.

2. Paragraph (2) permits the procuring entity to extend the deadline in certain circumstances. The deadline should be extended only in exceptional cases, since frequent extensions could result in inefficiency in the tendering proceedings and could facilitate abuse (e.g., by enabling the procuring entity to favour a particular late contractor or supplier).

3. The policy underlying paragraph (3) is that considering a late tender would be unfair to other contractors and suppliers. It could also interfere with order and efficiency in the tendering proceedings. [However, the procuring entity is permitted to consider a tender that was submitted late due to circumstances beyond the control of the contractor or supplier.] [Working Group note: that sentence and the provision of paragraph (3) to which it refers have been placed within square brackets to invite the Working Group to consider whether or not such a provision should be included]. To be timely, a tender must be received by the procuring entity prior to the deadline for submission of tenders. Thus, the risk of non-delivery or mis-delivery is upon the contractor or supplier.

[4. With respect to the second sentence of paragraph (4), the procuring entity may wish in some cases to enable contractors and suppliers to submit tenders by means other than writing. Tenders submitted by such means must contain all information and documentation required by the procurement documents. Thus, submission by such means would be practicable only in the case of simple tenders where price and a minimum of other factors (e.g., the delivery date) are the only aspects in respect of which tenders are solicited and that require a minimum of supporting information and documentation. In such cases, the procurement documents might, for example, call upon contractors and suppliers to communicate to the procuring entity their tender prices and their offers concerning any other factors in respect of which tenders are solicited, together with a statement that by submitting a tender the contractor or supplier is deemed to have agreed to all the terms, conditions and provisions set forth in the procurement documents. [Working Group note: this paragraph and the sentence to which it refers have been placed within square brackets in order to invite the Working Group to consider whether or not such a provision should be included. Enabling tenders to be submitted by means other than in writing and in sealed envelopes (e.g., by telex or facsimile) could promote speed and efficiency; however, such means do not provide the confidentiality of tenders that is provided by submission of tenders in sealed envelopes.]

5. The manner, place and deadline for the submission of tenders must be set forth in the procurement documents (article 18(m)).

* * *

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the procurement documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security. The request and the responses thereto shall be made in writing or by any other means that provides a record of the information contained therein.

(b) The procuring entity may require contractors and suppliers that agree to the extension to extend or to procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, to provide new tender securities, to cover the extended period of effectiveness of their tenders.

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders by communicating the modification or a notice of withdrawal to the procuring entity in writing or in any other form that provides a record of the information contained therein. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 138-143; A/CN.9/315, paras. 76-78]

1. The procuring entity will normally want tenders to remain in force and effect for a period of time beyond the deadline for the submission of tenders. This is because it usually takes some time after the opening of tenders for them to be processed and for the contract to enter into existence. The procuring entity will want to be assured that, after completion of those procedures, a procurement contract will enter into existence in accordance with the terms and conditions of the tender that has been accepted. In addition, the procuring entity will want to be sure that if, for some reason, the procurement contract does not enter into existence, or if the contractor or supplier whose tender is accepted fails to supply a required security for the performance of the contract, other tenders will remain in force and effect and capable of being accepted.

2. Under paragraph (1), the procuring entity is to fix the length of the period of effectiveness of tenders. The period must be set forth in the procurement documents (article 18(o)). The period should be long enough to cover the amount of time it should realistically take to open, evaluate and compare the tenders, obtain all necessary approvals (which may include the approval of a lending institution), for the procurement contract to enter into force and for the tenderer to supply a security for the performance of the contract, if required. However, the period of effectiveness should not be excessively long; otherwise, higher tender prices may result since contractors and suppliers will have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., the risks of higher manufacturing or construction costs; the necessity for contractors and suppliers to keep their resources committed to the project for the long period of time; the costs of the tender security covering the long period of time).

3. Paragraph (2)(a) permits the procuring entity to request an extension of the period, for example, in cases where the tendering proceedings cannot be concluded and the contract cannot be entered into within the specified period of time. Extensions of the period should be avoided, since they could result in the loss of advantageous tenders and could interfere with the efficient functioning of the tendering proceedings. To avoid the necessity of extending the period the procuring entity should endeavour to fix in the procurement documents a period of time of as realistic a length as possible. With respect to paragraph (2)(b), see paragraph 9 of the commentary to article 26.

4. With respect to paragraph (3), the ability to modify tenders by means other than in writing (e.g., by telex or facsimile) enables contractors and suppliers to make last-minute adjustments to their tender prices.

* * *

SECTION VI. TENDER SECURITIES

Article 26. Tender securities

(1) If the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

[(b) in international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity of the type or a type, if any, specified in the procurement documents, unless the issuance of the security would otherwise be in violation of the law of [this State]].

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security to the contractor or supplier that supplied it, after the earliest to occur of:

(a) the expiry of the tender security,

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required, or

(c) the rejection by the procuring entity of all tenders pursuant to article 28(2) or (3) or article 29.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 144-154; A/CN.9/315, paras. 79-84. Pursuant to A/CN.9/315, para. 79, the Secretariat proposes to refer generically to the instrument provided by a contractor or supplier to secure its obligations in the tendering proceedings as a "tender security". An effort has been made to set forth in this article minimal rules to regulate matters that are particular to tender securities. The principal reason for this is that the legal system of the implementing State is likely already to contain rules governing securities in general, which it would be unnecessary and even dangerous to duplicate in the model law. The Working Group will recall that, at the twenty-second session of the Commission (1989), it was decided to undertake the preparation of a uniform law on independant guarantees and stand-by letters of credit. It might be expected that various issues addressed in that project will be of relevance to tender securities.]

1. The term "tender security" is defined in article 2(f). The basic purpose of a tender security is to provide funds to cover at least a portion of the losses that a procuring entity would suffer if the tender was withdrawn prematurely or if for other reasons (see paragraph 7 of the present commentary) a procurement contract with the contractor or supplier whose tender had been accepted did not enter into force. Those losses could include, for example, the costs of having to engage in new procurement proceedings, the difference between the tender price of the defaulting contractor or supplier and a higher price that the procuring entity ultimately must pay, and losses due to delays in procurement. Other possible purposes of requiring a tender security are to discourage the contractor or supplier from committing one of the above-mentioned defaults. It should be noted, however, that under certain types of tender securities the procuring entity may be able to claim the amount of the security without having to prove a default by the contractor or supplier and without having to prove loss.

2. It is for the procuring entity to decide whether or not to require a tender security in particular tendering proceedings. A requirement that a tender security be provided must be set forth in the procurement documents (article 18(1)). Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low-value items, the risks faced by the procuring entity and its potential losses are generally low, and the cost of providing a tender security -- which will normally be reflected in the contract price -- will be less justified. Since the cost of providing a tender security may be reflected in the tender prices, it would be desirable for procuring entities to require securities only when needed to protect their interests.

3. Under paragraph (1)(a) the procuring entity may require a tender security only of all contractors and suppliers. It may not require a tender security from some contractors and suppliers and exempt others from the requirement.

4. Any requirements of the procuring entity with respect to the nature and amount and other principal terms and conditions of the tender security and with respect to the type or types of institutions from which tender securities will be acceptable must be set forth in the procurement documents (article 18(1)). It may be desirable for the procurement documents to include a form of a required tender security (see paragraph 13 of commentary to article 18). If a form is included, all terms and conditions contained in the form would become requirements to which tender securities provided by contractors and suppliers would have to conform. If a tender security did not conform to the requirements set forth in the procurement documents, the tender would have to be rejected as non-responsive (article 28(2)(c)).

5. With respect to the nature of the security, a guarantee is often required by procuring entities. Other possible types of security include a bond, irrevocable letter of credit, cheque and cash deposit with a financial institution as stake-holder. The procuring entity may require a particular type of security from a particular type of institution (e.g., a guarantee or a bond from a bank, surety company or other financial institution), or it may specify two or more types of securities or institutions which would be acceptable, giving contractors and suppliers the option to choose which to provide.

6. It is desirable that the required amount of the tender security be high enough to give the procuring entity a reasonable level of protection, but not so high that the cost of obtaining it dissuades qualified tenderers from participating in the tendering proceedings. It may be desirable in some cases for the required amount of the tender security to be expressed as a specified sum of money, rather than as a percentage of the tender price. The percentage approach could enable a tenderer to ascertain the tender prices offered by other tenderers if it were able to discover the amounts of the tender securities supplied by them.

7. Among the required terms and conditions of the tender security set forth in procurement documents should be the conditions under which the procuring entity is entitled to the amount of the security. For example, the procurement documents might require the tender security to provide that the procuring entity is entitled to claim the amount of the security if the contractor or supplier withdraws or modifies its tender contrary to the provisions of article 25, if the contractor or supplier does not accept a correction by the procuring entity of an arithmetical error in its tender (see article 28(1)(b) and (2)(b)), or if the tender submitted by the contractor or supplier has been accepted by the procuring entity but the contractor or

supplier fails to sign a procurement contract if required to do so (see article 32(3)) or fails to provide a required security for the performance of the procurement contract. With respect to the latter condition, it might be specified that the procuring entity may not claim the amount of the tender security if the written procurement contract that the contractor or supplier fails to sign does not conform to its tender. When a security in the form of a tender guarantee is required, the procurement documents should clearly indicate whether the guarantor is obligated to pay the amount of the guarantee if an event mentioned in the guarantee in fact occurs, or merely upon presentation of a document by the procuring entity stating that the event has occured.

[8. Paragraph (1)(b) is intended to avoid unnecessary obstacles to participation in international procurement proceedings by some foreign contractors or suppliers that could arise if they were restricted to providing securities issued by institutions in the implementing State.]

[Working Group note: the preceding paragraph and the provision to which it refers have been placed within square brackets to invite the Working Group to consider whether such a provision should be included. An argument in favour of including such a provision is stated in the preceeding paragraph. An argument against including such a provision, and in favour of enabling the procuring entity to require the tender security to be issued by a local institution, is that, if the procuring entity considers itself to be more secure with a security from local institution (e.g., if it considers it easier to enforce a claim to the guarantee amount against a local institution than against a foreign one), it should be able to impose such a requirement; any higher cost to a foreign contractor or supplier from providing a tender security issued by a local institution or obtaining a counter guarantee would be reflected in the tender price which, if the tender was accepted, would be passed on to the procuring entity. Subparagraph (b) seeks to reconcile the policy of avoiding obstacles to participation by foreign contractors and suppliers with the above-mentioned interest of procuring entities.]

9. The procurement documents should specify the period of time during which the tender securities to be provided by contractors and suppliers must be in effect. It is generally desirable to require tender securities to be in effect for the entire period of time during which tenders must remain in effect (see article 25), plus an additional period of time to enable the procuring entity to take action to claim the amount of the security if necessary. If a tender security were to remain in effect only until, for example, the deadline for submission of tenders, or until a tender had been accepted, and the contractor or supplier whose tender had been accepted failed to sign a procurement contract or to supply a security for performance, the procuring entity could find that the tender security had expired, leaving the procuring entity without protection.

10. Paragraph (2) is intended to protect the rights of the contractor or supplier in respect of a tender security provided by it. If the procuring entity violates this provision by making a claim under the tender security after any of the indicated events occur he will incur liability under applicable legal rules to the contractor or supplier that supplied the security. The time when a procurement contract enters into force is specified in article 32(2) and (3)(b). The requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or other transferable medium of value.

* * *

SECTION VII. OPENING, EXAMINATION, EVALUATION AND COMPARISON OF TENDERS

Article 27. Opening of tenders

(1) Tenders shall be opened at the time set forth in the procurement documents as the deadline for the submission of tenders or an extension thereof, at the place and in accordance with the procedures specified in the procurement documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 157-160; A/CN.9/315, paras. 85-87]

1. Permitting contractors and suppliers or their representatives to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables tenderers to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis.

2. For the procurement of simple goods or construction, where the examination, evaluation and comparison of tenders is routine (e.g., where the only variable in tenders is the tender price and where the procuring entity must accept the tender of the eligible and qualified contractor or supplier offering the lowest price (see article 28(7)(c)(i)), the opening of tenders might be conducted by an official of the procuring entity, such as the chief procurement officer. In cases where the examination, evaluation and comparison of tenders is complex (e.g., where the most economically advantageous tender must be ascertained; see article 28(7)(c)(ii)), the implementing State might consider it desirable for the opening of tenders to be conducted by a committee, composed of representatives of the procuring entity and of various relevant ministries, departments or other governmental organs (e.g., ministries of trade and of finance, the central bank and the financial controller). The implementing State could provide for such a committee by regulation.

3. The procurement documents must set forth the place, date, time and procedures to be followed for the opening of tenders (article 18(p)).

* * *

Article 28. Examination, evaluation and comparison of tenders

(1) (a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).

(b) The procuring entity shall correct purely arithmetical errors discovered in a tender. Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier.

(2) The procuring entity shall reject a tender:

(a) if the contractor or supplier that submitted the tender is not eligible [, subject to article 8(4),] or is not qualified to perform the procurement contract;

(b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive, except as provided in paragraph (6) of this article and in article 29(1)(a).

(3) Subject to approval, the procuring entity may reject a tender if the contractor or supplier that submitted it attempts improperly to influence the procuring entity in the process of examining, evaluating or comparing tenders or ascertaining the most advantageous tender.

(4) (a) A tender is responsive if it conforms to the required characteristics of the goods or construction to be procured, contractual terms and conditions and other requirements set forth in the procurement documents. However, the procuring entity may regard a tender as responsive if it contains only minor deviations that do not materially alter or depart from those characteristics, terms, conditions and other requirements. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders.

(b) Alterations of or departures from required characteristics, terms, conditions and other requirements of the procurement documents are material if they concern, among other things, the nature and technical and quality characteristics of the goods or construction; the quantity of the goods; the location where the construction is to be effected; the time when the construction is to be completed; the place or time when the goods are to be delivered; the terms of the procurement contract relating to the price or payment thereof; the extent of liability of one party to the other; the settlement of disputes; the tender security; the security for performance of the procurement contract; or the quality guarantee in respect of the goods or construction.

[(5) If the procurement documents solicit tenders for alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents, the procuring entity shall evaluate and compare such alternative tenders together with the tenders based on the characteristics, contractual terms and conditions and other requirements set forth in the procurement documents in order to ascertain the most advantageous tender.]

(6) [Alternative 1]

[A contractor or supplier wishing to submit an unsolicited tender for an alternative to the technical characteristics of the goods or construction set forth in the procurement documents must also submit a tender conforming to the technical characteristics set forth in the procurement documents. An alternative tender may be considered by the procuring entity only if it was submitted by the contractor or supplier whose tender based on the technical characteristics set forth in the procurement documents has been found to be the most advantageous of such tenders.]

[Alternative 2]

[The procuring entity may consider an unsolicited tender for an alternative to the technical characteristics of the goods or construction set forth in the procurement documents if a reasonable opportunity is provided to all eligible and qualified contractors and suppliers that have submitted tenders conforming to the technical characteristics set forth in the procurement documents to alter their tenders or to submit additional tenders based on the alternative tender. The procuring entity shall evaluate and compare the alternative, altered and additional tenders together with the unaltered tenders in order to ascertain the most advantageous tender.]

(7) (a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most advantageous tender in accordance with the procedures and criteria set forth in the procurement documents.

(b) The evaluation and comparison of tenders shall be carried out in an objective manner.

(c) The most advantageous tender shall be either:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or

(ii) the most economically advantageous tender, which shall be ascertained on the basis of objective and quantifiable criteria, to he extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods or construction; the efficiency and productivity of the goods or construction; the time for delivery of the goods or completion of the construction; the terms of payment; and

the terms and conditions of the quality guarantee in respect of the goods or construction; in so far as such criteria are not the subjects of required characteristics of the goods or construction or required contractual terms or conditions set forth in the procurement documents.

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria directed to ascertaining the impact of tenders in relation to specific Government programmes or policies for the promotion of national economic development, economic development of particular regions within [this State] or development of particular industries or economic sectors. To the extent possible, such criteria shall be expressed in the procurement documents in objective and quantifiable terms.]

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by adding to the tender prices of all tenders other than those that are to benefit from the margin of preference the amount provided for in the procurement regulations.

(8) When tender prices are expressed in two or more currencies, the tender prices shall be converted to a single currency for the purpose of evaluating and comparing tenders.

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 33(2).

[(10) The ascertainment by the procuring entity of the most advantageous tender is subject to approval.]

* * *

Commentary

Paragraphs (1) to (4)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 137, 162-168; A/CN.9/315, paras. 75, 88, 89]

1. With respect to paragraph (1)(b), if the contractor or supplier does not accept the correction its tender must be rejected (paragraph (2)(b)).

[2. The reference in paragraph (2)(a) to article 8(3) is a reminder that a contractor or supplier that is ineligible or cannot establish its eligibility can, under certain conditions, participate in the tendering proceedings.]

[Working Group note: the reference in the text to article 8(3) and the foregoing paragraph of the commentary have been placed within square brackets due to the differing views reflected in A/CN.9/315, para. 39.]

3. Pursuant to paragraph (2)(c), responsiveness is defined in paragraph (4). Paragraph (4) permits, but does not require, the procuring entity to regard a tender as responsive if it contains only minor, nonmaterial deviations. Paragraph (4)(b) elaborates upon the concept of "material" deviation. [Working Group note: as suggested in A/CN.9/315, para. 89, paragraph (4)(b) is adapted from article 19 of the United Nations Sales Convention.]

4. Paragraph (4)(a) requires the procuring entity to quantify permitted minor deviations and to take them into account in the evaluation and comparison of tenders. If the most advantageous tender is to be that with the lowest tender price (paragraph (7)(c)(i)), the deviations should be quantified in monetary terms and added to or subtracted from the tender price, as appropriate. If the most advantageous tender is to be the tender found to be the most economically advantageous (paragraph (7)(c)(ii)), the quantification should be incorporated appropriately in the calculations engaged in to ascertain that tender.

5. A procuring entity may in some cases wish to establish a maximum or minimum price, or a range of prices within which tender prices must fall (e.g., 10% above and below the average (e.g., mean or median) of tender prices of tenders submitted by eligible and qualified contractors and suppliers). Any such requirement must be set forth in the procurement documents (article 18(j)). A tender with a price that exceeds the maximum price, that is lower than the minimum price or that falls outside the range of prices is non-responsive and, except as provided in article 30(1)(a), must be rejected.

6. A reason for establishing a maximum price may be to set a limit to the amount that the procuring entity will pay for the goods or construction. This limit sometimes reflects a maximum budgetary appropriation for the procurement. A reason for establishing a minimum price is that a contractor or supplier may be unlikely to be able to perform the contract at a price below that amount, or could do so only by using substandard workmanship or materials or by suffering a loss. An abnormally low price could also in some cases indicate collusion between tenderers. A reason for establishing or range of tender prices may be based on the notion that the range constitutes a zone of reasonable prices for the goods or construction to be procured.

7. For the procurement of goods or construction that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may in some cases wish to permit contractors and suppliers to submit tenders either for the entirety of the goods or construction or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single contractor or supplier or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also have the advantage of encouraging participation by large contractors and suppliers that prefer to tender for higher value contracts, and that would be attracted by the ability to tender for the entirety of the goods or construction, as well as by smaller contractors and suppliers, that may have the capacity to submit tenders only for certain portions. On the other hand, permitting partial tenders can complicate the process of comparing tenders.

8. The procurement documents must specify the portion or portions of the goods or construction for which partial tenders may be submitted (article 18(h)). A procuring entity may not merely to divide the entirety of the goods or construction to be procured into separate contracts as it sees fit after tenders are submitted. A partial tender is responsive if it conforms with the procurement documents.

Paragraph[s (5) and] (6)]

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 135, 136; A/CN.9/315, paras. 70-74, 88, 89]

9. [These two paragraphs concern the question of alternative tenders. Paragraph (5) deals with cases in which the procurement documents solicit from contractors and suppliers alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents.] Paragraph (6) deals with unsolicited alternative tenders submitted by contractors and suppliers.

[10. In the case of solicited alternative tenders, the procurement documents may, but need not, indicate the characteristics, contractual terms and conditions or other requirements in respect of which alternatives are solicited. Alternative tenders that are expressly solicited by the procurement documents should not be regarded as non-responsive per se.]

11. Unlike solicited alternative tenders, unsolicited alternative tenders are non-responsive. Nevertheless, there may be exceptional cases in which the procuring entity may wish to be able to consider potentially advantageous but unsolicited alternative tenders. Paragraph (6) enables it to do so, in its discretion, and sets forth conditions and rules governing the consideration of such tenders intended to ensure fair treatment of contractors and suppliers that have submitted responsive tenders. In some cases, the procuring entity may prefer to reject all tenders pursuant to article 29 and to begin new tendering proceedings based on the alternative tender.

[Working Group note: Paragraph (5) has been included because the Working Group called for provisions dealing with alternative tenders (A/CN.9/315, especially para. 74). However, that paragraph and the corresponding portions of the foregoing commentary have been placed within square brackets because a provision dealing with solicited alternative tenders, which is the subject of paragraph (5), may not be needed. This is because an alternative tender that is submitted pursuant to an express solicitation of alternative tenders in the procurement documents is not per se unresponsive, and should be treated as any other tender.]

[Two alternative versions of paragraph (6) are presented. Under alternative 1, the procuring entity may consider an alternative tender only from the contractor or supplier that submitted the most advantageous responsive tender. Under alternative 2, an alternative tender may be considered even if the contractor or supplier did not submit a responsive tender, as long as eligible and qualified contractors and suppliers that submitted responsive tenders have an opportunity to alter their tenders or to submit additional tenders based on the alternative. Both approaches seek to reconcile the interest of the procuring entity in being able to consider an alternative tender with the policies of fairness and competition. Arguments already expressed by the Working Group with respect to these approaches are set forth in A/CN.9/315, paras. 71 to 73. Several experts on procurement consulted by the Secretariat have favoured the approach in alternative 1.]

Paragraph (7)

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 169-188;
A/CN.9/315, paras. 90-100]

12. The rules in paragraph (7) reflect an essential feature of tendering proceedings, namely, that the evaluation and comparison of tenders is to be carried out in an objective manner and in accordance with objective and quantifiable criteria, to the extent possible, set forth in the procurement documents (see article 18(p)). Paragraph (7)(c) addresses itself to the criteria for evaluating and comparing tenders. The procuring entity must decide, and specify in the procurement documents, whether the most advantageous tender will be deemed to be the one with the lowest tender price or the one found to be the most economically advantageous. The most economically advantageous tender is to be ascertained on the basis of criteria of the nature indicated in paragraph (7)(c)(ii). That provision enumerates as examples a number of possible criteria. A central feature of those criteria is that they must be objective and quantifiable to the extent possible. Requiring the criteria to be of that nature preserves the essential element of competition in tendering proceedings by enabling tenders to be evaluated and compared on a common basis. In addition, by reducing the scope for discretionary or arbitrary decisions, it promotes certainty and confidence in the tendering proceedings. The procuring entity must, for each particular tendering proceedings, decide which specific criteria to employ in accordance with the nature of the procurement.

13. The qualifying words "to the extent possible" are included because not all permissible criteria will be wholly objective and devoid of judgmental factors. For example, in procuring lorries, one criterion of importance to the procuring entity may be the ergonomics of the driver's seat. The evaluation of the ergonomics of a seat proposed in a tender will of necessity be subjective to some extent. However, pursuant to the requirement that the evaluation and comparison of tenders be carried out "in an objective manner", the procuring entity may evaluate the ergonomic qualities of the seat in each tender by assigning a certain number of points within a given range depending upon the relative degree of ergonomic superiority that the seat is adjudged to possess.

14. The evaluation criteria referred to in paragraph (7)(c)(ii) do not include criteria that are the subjects of required characteristics, terms or conditions set forth in the procurement documents (see article 18(e) and (f) and paragraph 3 of the commentary to article 18) to which tenders must conform. If those required features are deviated from, the tender is non-responsive; the extent of deviation or conformity is not quantified or evaluated in ascertaining the most economically advantageous tender. By contrast, the non-required characteristics, terms and conditions referred to in paragraph (7)(c)(ii) are to be evaluated and compared for the purpose of ascertaining the most economically advantageous tender.

15. The following examples are given to illustrate the foregoing distinction. In the first example, it is important to the procuring entity that the goods to be procured be delivered by a particular date, and the procuring entity does not regard earlier delivery as beneficial. It specifies the delivery date in the procurement documents. A tender that provided for delivery at a later date would be unresponsive. A tender that provided for delivery at an earlier date would not be unresponsive; however, no advantage in the evaluation and comparison of tenders would be given to such a tender.

In the second example, the procuring entity wishes contractors and suppliers to make their best offers with respect to the delivery date. It stipulates in the procurement documents that the time of delivery will be a factor to be taken into account in the evaluation and comparison of tenders, with early delivery being advantageous. It might even indicate a desired delivery date, without, however, requiring delivery by that date. The evaluation and comparison of tenders would take into account the delivery times offered together with the other criteria set forth in the procurement documents in order to ascertain the most advantageous tender.

16. Ascertaining the most advantageous tender on the basis of the tender price alone provides the greatest objectivity and automaticity. It is also relatively easy to administer. However, it is also the less flexible of the two possible approaches, since criteria other than price that may make certain tenders more or less advantageous than others cannot be taken into account. Under this approach, therefore, the procuring entity must take care to formulate its specifications, terms, conditions and other requirements with sufficient completeness and precision so that all tenders conforming to them will satisfactorily meet the procuring entity's needs, and so that the relative advantages of the tenders will be reflected in the tender prices alone. It is therefore most appropriate for relatively simple, routine goods or construction.

17. The approach under which the procuring entity ascertains the most economically advantageous tender on the basis of criteria in addition to the tender price offers greater flexibility than the approach based on the tender price alone. It permits the relative advantages of tenders to be compared along a broader spectrum of parameters. This may be increasingly important as the goods or construction become less standardized and more complex.

18. Pursuant to paragraph (7)(b), the evaluation and comparison of tenders must be carried out in an objective mannner. When the most advantageous tender is to be the one with the lowest tender price, the method of evaluating and comparing tenders is relatively straightforward - tender prices alone are compared.

19. When the most advantageous tender is the one that is the most economically advantageous, the method of evaluation and comparing tenders is more complicated. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the procurement documents and to combine those quantifications with the tender price. The tender resulting in the lowest evaluated price is regarded as the most economically advantageous tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the procurement documents. The tender with the most favourable aggregate weighting is the most economically advantageous tender. The manner in which the weightings will be assigned should be specified in the procurement documents.

20. Paragraph (7)(d) has been included because, in some countries, particularly developing countries, it is important for procuring entities to be able to take into account criteria to permit the evaluation and comparison of tenders in the context of economic development objectives. Such criteria are sometimes less objective and more discretionary than those referred to in paragraph (7)(c)(ii). In some cases, therefore, their use in evaluating and comparing tenders could impair competition and reduce economy in procurement

and confidence in the procurement process. The provision has been placed within square brackets with the intention that it would be included by an implementing State in which the ability of procuring entities to use such criteria is of particular importance, but need not be included by other implementing States.

21. Paragraph (7)(d) has been formulated with the objective of minimizing the possible disadvantageous consequences mentioned in the preceeding paragraph. Firstly, a procuring entity may not use the criteria as the sole basis for the evaluation and comparison of tenders; it may apply the criteria only "in addition to the criteria of the nature referred to in paragraph (7)(c)(ii)". Thus, even if the additional criteria permitted by the provision are less than objective, there will remain a sound objective element to the evaluation and comparison of tenders. Secondly, "to the extent possible" the additional criteria must themselves be expressed in objective and quantifiable terms. For example, as an indication of the effect of a tender on the country's foreign exchange reserves, a criterion might be the extent to which the tenderer will accept payment in the local currency; as an indication of the extent to which a tender promotes the development of domestic industries, a criterion might be the extent to which domestic labour or subcontractors would participate in the manufacture of the goods or in the construction or the degree of domestic content or domestic value added in the goods; as an indication of the degree of transfer of technology to the country, a criterion might be the extent of the undertaking in a tender to train local personnel. Thirdly, the additional criteria must be designed to ascertain the impact of tenders in relation to "specific" Government economic programmes or policies. These criteria do not include those that are the subject of required contractual terms or conditions (see paragraph 14 of the present commentary).

22. Paragraph (7)(e) permits a procuring entity to grant a margin of preference to domestic tenders and sets forth rules for its application. Its purpose is to promote national economic development and the development of domestic industry. It should be noted, however, that States that are parties to the GATT Procurement Agreement and member States of the EEC may be restricted in their ability to accord such preferential treatment. The procurement regulations may establish criteria for qualifying as a "domestic" contractor or supplier (e.g., that the contractor or supplier be registered in the implementing State, that it have majority ownership by nationals of the implementing State, and that it not subcontract more than 50% of the value of the construction to foreign contractors or suppliers) and for qualifying as "domestically produced" goods (e.g., that they contain a minimum domestic content or value added). The procurement regulations should also set forth the amount of the margin of preference. Differing amounts might be set forth for goods and for construction.

[Working Group note: As a technique for achieving the economic objectives mentioned above, it may be preferable to enable both foreign and domestic contractors and suppliers to participate in tendering proceedings but to give a margin of preference to domestic contractors and suppliers, rather than to restrict participation and procurement to domestic tenderers alone. One economic analysis has concluded that the former technique could reduce the cost of procurement by increasing the competitive pressures on foreign contractors and suppliers, compelling them to submit lower tender prices. The latter technique, on the other hand, tends to lead to higher procurement costs because it does not contain those competitive incentives and, in fact, restricts competition. McAlee and McMillan, "Government Procurement and International Trade", Journal of International Economics, vol. 26, pp. 291-308 (1989).]

23. In some cases, a procuring entity may wish to use a "two envelope" system for opening, evaluating and comparing tenders. Under that system, the procurement documents require contractors and suppliers to organize their tenders into two sealed envelopes, the first envelope containing documents and information relative to the eligibility and qualifications of the contractor or supplier and the technical, contractual and other components of the tender other than the tender price, and the second envelope containing only the tender price. At the opening of tenders, the procuring entity opens the first envelopes and examines the tender components contained therein with respect to the eligibility and qualifications of contractors and suppliers and with respect to the responsiveness of the tenders. It then evaluates the tender components contained in the first envelopes of tenders that have not been rejected (e.g., with respect to the technical characteristics of the goods or construction and the contractual terms and conditions, excluding price, contained in the tenders). The procuring entity then opens the second envelopes (i.e., the envelopes containing the tender prices) of tenders that have not been rejected, and factors the tender price into the evaluation of each tender. The evaluations of the tenders are then compared in order to ascertain the most economically advantageous tender. The reason for using this system is to ensure that the procuring entity evaluates the non-price aspects of each tender without being influenced by the price. If such a system is used, the procedures and evaluation criteria should be set forth in the procurement documents.

Paragraph (8)

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 179
A/CN.9/315, paras. 95, 96]

24. When two or more currencies are used for expressing tender prices, the tender prices will have to be converted to a single currency in order to permit tenders to be compared on a common basis. (Pursuant to article 2(g), "currency" includes unit of account.) This paragraph sets forth rules with respect to the conversion. The conversion is to be made only for the purpose of comparing and evaluating tenders; it does not concern the question of the currency or currencies in which the contract price is to be paid.

25. The tender prices may be converted to a national currency, such as the currency of the country of the procuring entity. However, in order to reduce possible distortions in the relative values of tender prices due to distortions in the valuation of the various currencies used in the tenders against the currency used as the common basis for comparison (e.g., currencies used in some tenders may be overvalued while others may be undervalued), a procuring entity may wish to use as the basis for comparison either an internationally used unit of account consisting of a basket of currencies (e.g., the Special Drawing Right (SDR) of the International Monetary Fund) or a relatively stable national currency customarily used in international trade.

26. The procurement documents must set forth the currency that will be used for evaluating and comparing tenders and the exchange rate or the means of determining the exchange rate to be used to convert tenders into that currency (article 18(q)).

Paragraph (10)

27. The existing practice in some countries is for the procuring entity to take the final decision as to which tender is to be regarded the most

advantageous. In other countries, the determination of the procuring entity is only provisional and is subject to approval by a higher authority, such as the relevant minister or the central procurement board (see paragraph 1 of commentary to article 6). Paragraph (10) has been placed within square brackets indicating that it may be included or excluded depending upon the customary or desired practice of the implementing State.

* * *

Article 29. Rejection of all tenders

(1) Subject to approval, the procuring entity may, at any time prior to the entry into force of the procurement contract, reject all tenders for any reason other than those set forth in article 28(2) or (3). However, the procuring entity may not reject all tenders for the purpose of invoking article 7(2)(b)(i) or for any fraudulent purpose.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders nor any obligation to inform them of the grounds for its action.

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 193, 194;
A/CN.9/315, paras. 102-104]

1. A procuring entity may wish to reserve the right to reject all tenders in the public interest, such as where there appears to have been a lack of competition or to have been collusion in the tendering proceedings, where the procuring entity's need for the goods or construction ceases or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting action constituting an abus de droit or a violation of fundamental principles of justice.

2. In invoking this article the procuring entity must reject all tenders, not just certain ones. If all tenders are rejected the procuring entity may engage in the procurement by using competitive negotiation proceedings (article 7(2)(b)(i)). However, the procuring entity may not reject all tenders for the purpose of engaging in competitive negotiation proceedings, or for any fraudulent purpose.

3. Pursuant to paragraph (2), the procuring entity incurs no liability towards contractors and suppliers, such as compensation for their costs of preparing and submitting tenders, solely by virtue of its invoking paragraph (1).

* * *

Article 30. Negotiations with contractors and suppliers

(1) No negotiations shall take place between the procuring entity and a contractor or suppliers with respect to a tender submitted by the contractor or supplier except that:

(a) if the procurement documents specify a maximum price for the goods or construction or a range of prices within which tender prices must fall, and all otherwise responsive tenders from eligible and qualified contractors and suppliers exceed that maximum price or range or prices, the procuring entity may negotiate with the contractor or supplier submitting the tender with the lowest price with a view towards reducing its tender price;

(b) if it appears from the evaluation and comparison of tenders that no one tender is obviously the most advantageous, the procuring entity may negotiate with contractors and suppliers whose tenders appear to be more advantageous than others with a view towards the modification of one of those tenders so that it is more advantageous than the others.

(2) No negotiations permitted by paragraph (1) shall take place concerning any required characteristics of the goods or construction, or any required contractual term or condition, set forth in the procurement documents.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 170, 189-192; A/CN.9/315, para. 101]

1. Except in the two cases specifically mentioned in paragraph (1), negotiations between the procuring entity and tenderers are not permitted. (See, however, article 31.) The model law provides in appropriate cases for procurement by competitive negotiation and for single-source procurement, in both of which negotiations of a broad scope are possible (see article 7(2) and (3)). With respect to the reference to a maximum price or a range of prices in paragraph (1)(a), see paragraphs 5 and 6 of commentary to article 28.

2. The rule contained in paragraph (2) is intended to preserve the elements of uniformity in the evaluation and comparison of tenders and fairness to contractors and suppliers that submit responsive tenders. See, also paragraphs 14 and 15 of the commentary to article 28.

* * *

SECTION VIII. SPECIAL TENDERING PROCEDURES FOR SOLICITATION OF PROPOSALS

Article 31. Special tendering procedures for solicitation of proposals

(1) Subject to approval, the procuring entity may employ the procedures provided for in this article in cases where it seeks proposals from

contractors and suppliers with respect to the technical characteristics of the goods or construction to be procured because multiple alternative technical solutions might meet the needs of the procuring entity or because, due to the nature of the goods or construction, the procuring entity is unable to formulate detailed technical characteristics.

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) The procurement documents shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price.

(4) The procuring entity may engage in discussions with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or 29 concerning any aspect of its tender, other than a required characteristic of the goods or construction or a required contractual term or condition set forth in the procurement documents.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting its tender security. The final tenders shall be evaluated and compared in order to ascertain the most advantageous tender.

(6) The procuring entity shall include in the minutes required under article 33 a statement of the circumstances on which it relied in invoking the provisions of this article, specifying the relevant facts.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 60-61; A/CN.9/315, para. 113. This article concerns the proceedings referred to in the above-mentioned documents as "competitive negotiation" proceedings. In the present draft that term has been used for the proceedings provided for in article 7(2) and article 34, for reasons given in the commentary to article 34.]

1. In principle, tenders must be evaluated and compared uniformly on the basis of detailed technical specifications and contractual terms and conditions formulated by the procuring entity, with no negotiations being permitted between the procuring entity and contractors and suppliers, except as provided in article 30. The present article provides procedures for use where, for the reasons stated in paragraph (1), the procuring entity does not or cannot formulate its technical requirements in detail. This may be the case, for example, where the procuring entity wishes to receive various proposals for technical solutions as to its procurement need (e.g., the construction of a bridge) or where the procuring entity seeks to procure a piece of non-standardized, technologically-advanced equipment for which it can formulate only general performance criteria, and relies on contractors and suppliers to propose designs or develop technologies to meet those criteria. The procedures might be used, for example, in turnkey or "design and

construct" projects. However, the procedures should be regarded as exceptional. Their use must be approved (see paragraph 1 of the commentary to article 6), and the procuring entity must set forth in the minutes of the tendering proceedings its justification for invoking the procedures. If the article is invoked the procedures to be followed must be set forth in the procurement documents (article 18(p)).

2. These procedures are to employed in the context of tendering proceedings. Thus, pursuant to paragraph (2), the provisions of chapter II of the model law apply to the proceedings except to the extent those provisions are derogated from in the present article. For example, the technical and other parameters of the goods or construction to which proposals must conform must be set forth in the procurement documents in an objective manner to the extent possible (article 20(2)). Those parameters might include, for example, design parameters (e.g., dimensions), and quality, safety and performance characteristics of the goods or construction.

3. With respect to the reference to "a required characteristic of the goods or construction" in paragraph (4), see paragraphs 14 and 15 of the commentary to article 28 and paragraph 2 of the commentary to article 30.

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SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT; MINUTES OF TENDERING PROCEEDINGS

Article 32. Acceptance of tender and entry into force of procurement contract

(1) [Subject to approval,] the tender that has been ascertained to be the most advantageous shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier that submitted the tender.

(2) A procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier that submitted the tender, provided that it is [dispatched] [received] while the tender is in force and effect.

(3) (a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. The contractor or supplier shall sign the written procurement contract within a reasonable period of time after the notice is [dispatched to] [received by] it.

(b) The procurement contract enters into force when the written procurement contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier until the entry into force of the procurement contract, the contractor or supplier shall take no action which interferes with the entry into force of the procurement contract or with its performance.

(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to

provide any required security for the performance of the contract, the tender that is ascertained to be the next most advantageous tender and that is in force and effect may be accepted [,subject to approval]. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein.

(b) [Alternative 1: The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a).]

[Alternative 2: The notice referred to in paragraph (1) is "received" by the contractor or supplier when it is received by it personally or at its place of business or mailing address.]

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Commentary:

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 195-199; A/CN.9/315, paras. 105-107]

1. Paragraphs (2) and (3) set forth uniform legal rules with respect to the entry into force of the procurement contract. The entry into force of the contract is distinguished from the arising of obligations under the contract. For example, a procurement contract may have entered into force in accordance with the rules in the present article, but under the contract the obligations of the contractor or supplier may be subject to a condition (e.g., that the procuring entity obtain necessary import licenses).

[Working Group note: In connection with paragraphs (2) and (3), the Working Group may wish to consider whether to follow the "dispatch" or "receipt" approach with respect to the notice. The "receipt" approach is used in the United Nations Sales Convention, article 18(2). The Working Group might consider, however, whether the "dispatch" approach is more appropriate in the particular circumstances of procurement. In essence, what is at stake is the risk of a delay or a failure in the transmission of the notice. In order to bind the contractor or supplier to a procurement contract or obligate it to sign a written procurement contract, the procuring entity must give the notice while the tender is in force and effect. Under the "receipt" approach, if the notice was properly transmitted or conveyed to a transmitting authority by the procuring entity, but the transmission was delayed, lost or misdirected due to no fault of the procuring entity, so that the notice was not received by the contractor or supplier before the expiry of the period of effectiveness of its

tender, the procuring entity would lose its right to bind or obligate the contractor or supplier. Under the "dispatch" theory, that right of the procuring entity would be preserved. In the event of a delay, loss or misdirection of the notice, the contractor or supplier might not learn before the expiration of the period of effectiveness of its tender that the tender had been accepted; but in most cases, that consequence would be less severe than the loss of the right of the procuring entity to bind the contractor or supplier. Paragraph (6)(b) defines the time when the notice is ["dispatched to"] ["received by"] the contractor or supplier. The definition of "dispatched" is based upon a definition set forth in the UNCITRAL Construction Legal Guide, chapter IV, "General remarks on drafting", para. 25. The definition of "received" is based upon the definition set forth in the United Nations Sales Convention, article 24.]

2. Paragraph (3) sets forth rules concerning the signing of the contract, the entry into force of the contract and obligations of the contractor or supplier. As long as the notice to the contractor or supplier is timely, the contractor or supplier is obligated to sign a written procurement contract within a reasonable period of time after the notice, even if the period of effectiveness of its tender expires after the notice is given but before the contract is signed.

3. The approach followed by paragraph (2), under which the procurement contract enters into force upon giving notice to the contractor or supplier, may be satisfactory where there are no outstanding issues concerning the contract to be resolved and where all relevant terms are covered by the tender. The approach followed by paragraph (3), under which a written procurement contract must be signed, may be desirable where there exist outstanding contractual terms to be settled by the parties.

4. Under paragraph (4) the next most advantageous tender may be accepted if the contractor or supplier submitting the tender originally accepted fails to sign a written procurement contract, if required to do so, or fails to supply a required security for performance of the contract. The procuring entity may also exercise its rights under a tender security provided by the contractor or supplier that fails to perform those acts.

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Article 33. Minutes of tendering proceedings

(1) The procuring entity shall prepare minutes of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The minutes shall contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the eligibility and qualifications, or lack thereof, of those contractors and suppliers; the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The minutes of the tendering proceedings shall be made available for inspection by the general public after a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required, or after tendering proceedings

have been terminated without resulting in a procurement contract. However, no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 156, 200; A/CN.9/315, paras. 85, 103, 108]

The purpose of these provisions is to promote transparency of the tendering proceedings and to assist an aggrieved contractor or supplier to exercise its right to seek redress against improper procedures used or improper decisions taken by the procuring entity.

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CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF TENDERING PROCEEDINGS

Article 34. Competitive negotiation proceedings

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and supplier to ensure effective competition, but in any case with at least [3] contractors and suppliers unless negotiations with [3] contractors and suppliers are not possible or are not practicable.

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement; provided, however, that the foregoing provision shall not apply to documents or other information that is particular to negotiations with an individual contractor or supplier or to documents or information the disclosure of which would be contrary to any law of [this State] relating to confidentiality.

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4) (a) The procuring entity shall prepare minutes of the competitive negotiation proceedings. The minutes shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).

(b) The minutes of the competitive negotiation proceedings shall be made available for inspection by the general public after a procurement contract has entered into force, except that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

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Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras 201-212; A/CN.9/315, paras. 109-112. The use of the term "competitive negotiation proceedings" in reference to the proceedings provided for in this article is different from the use of that term in A/CN.9/WG.V/WP.22. In that document, the term is used to describe the procedures that are provided for in article 31 of the present text. The term "competitive negotiation proceedings" as used in the present text is defined in article 2(h).]

1. Competitive negotiation proceedings may be engaged in the circumstances set forth in article 7(2). Subject to the rules set forth in the model law and in the procurement regulations, and subject to any rules of the applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. The rules set forth in the present article are intended to allow that freedom to the procuring entity while incorporating an element of competition into the proceedings. In addition, various other articles of the model law apply to competitive negotiation proceedings, such as article 8 (eligibility of contractors and suppliers), article 9 (qualifications of contractors and suppliers) and article 10 (rules concerning written statements and documentary evidence provided by contractors and suppliers). In addition, the negotiations will be subject to any rules set forth in the procurement regulations and to any other rules of the applicable law.

2. Paragraph (1) allows considerable latitude to the procuring entity to choose the contractors and suppliers with which to negotiate. In general, however, the procuring entity must negotiate with a sufficient number of contractors and suppliers to ensure effective competition. [Working Group note: The required minimum number of contractors and suppliers has been placed within square brackets in order to invite the Working Group to consider the minimum number that should be required.] With respect to the final words of the paragraph, negotiations with the required minimum number of contractors and suppliers may be regarded as not possible or practicable if, for example, the goods or construction to be procured can be supplied only by a fewer number of contractors and suppliers.

3. It is often desirable for the procuring entity to establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner. In addition, it is often useful for the procuring entity to prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, and the desired contractual terms and conditions. Although many of these characteristics, terms and conditions will be subjects of the negotiations, they at least can serve as an indication of the desires of the procuring entity and a starting point for the negotiations. Documents of this nature are particularly useful where the procuring entity solicits proposals from contractors or suppliers.

4. In some cases, it is useful for the procuring entity, prior to the commencement of negotiations, to establish an estimated price for the goods or construction to be procured. Establishing an estimated price will serve as a guideline to the procuring entity in negotiating and agreeing upon a price that is fair and reasonable.

5. The procuring entity may find it useful in some cases to require the contractors and suppliers with which it negotiates to itemize their prices so as to enable the procuring entity to compare what is being offered by one contractor or supplier during the negotiations with what is being offered by the others. This, too, can help the procuring entity to evaluate and compare the offers of each contractor and supplier during the negotiations. [Working Group note: in accordance with the suggestion in A/CN.9/315, para. 112, the foregoing sentences have been adopted from the UNCITRAL Construction Legal Guide, Chapter III, "Selection of contractor and conclusion of contract", para. 46.] In addition, the procuring entity may find it desirable in some cases to seek to inspect contractors' and suppliers' relevant books or financial records and their construction, manufacturing or supply facilities.

6. The form that the contract must take (e.g., whether or not it must be in writing) is governed by the applicable law. Particularly in the case of complex goods or construction, it may be desirable for the procuring entity and each contractor and supplier with which it negotiates to stipulate, where permitted by the applicable law, that no contractual obligations exist between the parties until such time as a written contract has been entered into between them. [Working Group note: see UNCITRAL Construction Legal Guide, chapter III, "Selection of contractor and conclusion of contract", paras. 44 and 49]. The means and time at which a contract enters into existence will also be governed by the applicable law. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as those referred to in this paragraph will be subject to the internationally uniform rules contained in the Convention.

7. With respect to paragraph (4), see the commentary to article 33.

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Article 35. Record of single source procurement

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspectio by the general public after the procurement contract has entered int force; provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

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Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 62, 213;
A/CN.9/315, para. 113]

The procuring entity may engage in single source procurement proceedings as it sees fit, subject to this article and other applicable provisions of the model law (e.g., article 8 (eligibility of contractors and suppliers), article 9 (qualifications of contractors and suppliers) and article 10 (rules concerning written statements and documentary evidence provided by contractors and suppliers)), to any rules set forth in the procurement regulations and to any other rules of the applicable law. This article requires a relatively simple record of the procurement to be prepared and made available for public inspection (see the commentary to article 33).